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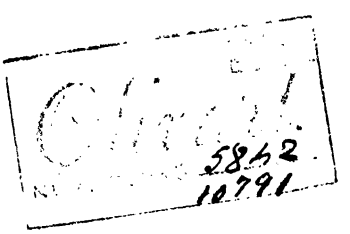
THE STATE

IN

CONSTITUTIONAL AND INTERNATIONAL LAW



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THE STATE
IN
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THE STATE IN CONSTITUTIONAL AND INTERNATIONAL LAW.[1]

CHAPTER I.

INTRODUCTION.

The thesis that the concept of the state in constitutional law must be discriminated from the concept of the state in international law is the outcome of a line of inquiry opened by the preparation of a paper for the Political Science Seminary of The Johns Hopkins University on the topic of "Suzerainty." An investigation of the authorities on this subject disclosed a veritable chaos. So great appeared the confusion of political science on this point that an examination of other political conceptions immediately suggested itself. There, too, lack of definiteness and uniformity was found.

The source of this confusion lies in the fact that these concepts are defined largely in terms of state and sovereignty; and it is these very terms that are themselves the most lacking in accepted values. In regard to the term "sovereignty," in particular, there is a dispute so hardily sustained that no definition is even tolerably acceptable to over one-half the students of politics. In fact, the absence of accord upon this fundamental question produces a schism in political philosophy so deep as to cleave it almost asunder,

[1] I wish to express my gratitude to Dr. W. W. Willoughby, under whom my studies in political science have been pursued, not only for his constant and careful criticism of this dissertation during its preparation, and for the generous contribution of ideas by which he has attempted to correct some of its obvious deficiencies, but especially for his kindly inspiration at all times.

since it is as one of the immediate results of this dissension that the question of the divisibility or indivisibility of sovereignty has apparently separated political thinkers into two groups so widely dissimilar in their views that it may almost be said that there are two political sciences. Since the subject-matter with which both of these groups of scientists deal is the same there would appear to be room for but one science. Yet it certainly requires a stretch of the idea to denominate as one science that which exhibits throughout two sets of standards the application of which to identical situations leads to results mutually untranslatable.

As has been said, the conflict between the two groups of thinkers revolves most hotly about the question of the divisibility of sovereignty. It is, of course, absurd to charge the semi-sovereigntists with lack of logic by alleging that they deem it possible to divide a supreme will; for they do not define sovereignty as supreme *will,* but as supreme *power,* and for that reason are able to assert the validity of their conception of a "semi-sovereignty." There really is no question, then, of the logical possibility of semi-sovereignty, as that question is usually understood. The real question grows out of the two different conceptions of sovereignty as will and as power. These two different ideas of sovereignty go hand in hand with two different conceptions of the state, for the ideas of state and sovereignty are too closely knit together to separate the one entirely from the other. It is, therefore, these two pairs of concepts that are considered in this inquiry: that is to say, on the one hand that theory of state and sovereignty from which is deduced the indivisibility of the latter; and, on the other hand, that theory which leads to the assertion of a divisible sovereignty.

A brief survey of political writings shows that the former of these theories has been developed and is held mainly by those authors who are most interested in the state from the

internal point of view; and the latter theory, that of indivisibility, by those who are chiefly concerned in the external relations of the state. Although this classification may be subject to many exceptions, it is nevertheless fair to attach the theory of indivisibility to analytical jurisprudence, which deals with municipal, or constitutional, law, and to attach the theory of divisibility to international law. Accordingly, the third and fourth chapters of the dissertation are devoted respectively to purely expository accounts of the constitutional, and of the international, theories of the state.

The expounders of each of these theories are thus seen to have a different original province of interest to which they have primarily directed their inquiries. Each school seeks, however, to apply its own theory throughout the entire range of political speculation; each regards its central concepts as of exclusive validity. To no question, from the status of the meanest subject to the most delicate relations of the great powers with one another, does either school deem its respective theory inapplicable.

It is true that, logically, analytic theory is extended to cover communities to which are denied the application of the principles of international law. Actually, however, such communities have been no more disregarded by the international school than by the other, owing perhaps to the influence of the former school, or quite possibly owing simply to paramount interest in the great nations of the world. The statement remains essentially correct, therefore, that the two schools of political philosophy seek to apply their principles to precisely the same objective material.

So opposite and irreconcilable do the two systems of thought appear that every student of politics would seem compelled to make a choice between them, and this process of choice, of accepting one theory and rejecting the other, has continued for centuries. Generations after gene-

rations of scholars have entered the science and made this choice: and yet what is the result? A fairly equal development, it may be answered, of each theory; equal accession of adherents to each; equal antiquity and equal modernness in each; equal insistence by each on its own claim to exclusive validity. As the years have passed, one illustrious name after another has been added to the disciples of the one theory and antagonists of the other, and one name after another, equally renowned, to the opponents of the former theory and partisans of the latter, until now each theory rests on authority so learned, so worthy of esteem and honor, that it must appal one, who has confidence in the power of human thought, to characterize either theory as radically false because of the logical absurdity of the concepts with which it works.

In consequence, the hypothesis is here advanced that each of these two theories has an exclusive sphere of utility and fundamental validity within the field of political phenomena. In order to restrict each theory to a limited sphere of operation it is necessary to discover elements inherent in the theory that properly negative its application within the sphere of the other. The endeavor is not to uphold either theory, even within a given sphere, for each has ample authority behind it; but to exclude each from a given sphere which shall thus be left undisputed to the other. It is negative criticism that is required. It is to this task that the fifth and sixth chapters are given.

The result of this critical consideration of the two theories is to show that that theory which has in anticipation been denominated the "constitutional theory" must be logically confined to the constitutional, or municipal, law of the state, and the international theory in like manner is limited to the domain of international law. The state, as a constitutional concept, is composed of elements different from those which make up the concept of the state in international law. In the seventh chapter an attempt is made to indicate the value

of this recognition and limitation of both theories, in dealing with certain conceptions of constitutional and international law.

No endeavor is made to apply the principles set forth to existing political phenomena; that is, to make a scientific application of these principles. Philosophy, in one sense at least, is the comprehensive synthesis of the doctrines and methods of science. The establishment of such principles for political science is the problem of political philosophy; it is with this philosophical problem that this dissertation is exclusively concerned.

CHAPTER II.

Present Political Terminology Unsatisfactory.

Political science deals with all matters in any way pertaining to communities of men as organized for the determination of human liberty and restraint in action. Thus it treats of the relations of these communities with one another and of their internal organization into governed and governors, of the authority and powers of governments, of the various forms of governmental organization, etc. It seeks to analyze such political phenomena as these, so that it may accurately classify the bodies with which they are connected into definite groups with distinctive titles.

The value of a technical vocabulary lies in its accuracy, the precision with which it is capable of communicating ideas. Uncertainty as to the nature of the category or concept to which a term refers, or doubt as to which of two or more ideas it is meant to represent, destroys its utility. Of course, it is not pretended that such indefiniteness and uncertainty may not exist in the public mind. Especially in the realm of politics are scientific terms popularly employed in a loose and unphilosophical manner. Thus, the word "sovereign" is found to designate variously the titular head of the state; the law-making body; the constitution-making body; in a yet wider sense, the whole nation or people; and even the abstract law. No scientific term should, however, produce uncertainty or indefiniteness in the minds of students of that science. To them, every term used in the science should express a certain and clear conception.

In what measure, it may be asked, does the terminology at present employed in political science conform to these requirements? An examination of its particular terms will afford the best answer.

Such a term as "suzerainty," for example, should convey a very distinct idea. It is used by nearly every writer on international law; and often used without explanation, upon the apparent assumption that its meaning is perfectly established and recognized. Thus Hannis Taylor, in his large treatise, says: "The suzerainty of the Porte over Egypt, which for centuries was a vassal state of the Ottoman Empire, administered through a Turkish Pasha," was placed in imminent peril by Mehemet Ali; and now "government is carried on under the direction and advice of Great Britain as the real suzerain." Mr. Taylor, however, nowhere says what constitutes either a "vassal state" or a "real suzerain."[1] Other writers, also, serenely employ this term without definition, as though confident of its current valuation.

Upon how good or how ill a foundation this faith is based may be readily apprehended by a comparison of the views of the authors quoted below.

Le Fur says suzerainty is the relation of a sovereign state to a non-sovereign state: "Dans un groupement d'Etats réunis à un autre Etat par des liens de vassalité, la souveraineté appartient à l'Etat suzerain, sans que les autres membres du groupe possèdent une participation quelconque à l'exercise du pouvoir suprême."[2]

Sirmagieff finds nothing in common between feudal and modern suzerainty, since: "Les engagements entre seigneurs et vassaux étaient des engagements entre particuliers plutot qu'entre Etats."[3] Suzerainty and semi-sovereignty he considers synonyms.

Rivier says a suzerainty is the same as a protectorate, and exists over a semi-sovereign state: "Aujourd'hui, lorsqu'on parle d'Etats vassaux, il s'agit d'Etats mi-souverains. —L'Etat mi-souverain est subordonné à un autre Etat, qui est le suzerain, aussi nommé protecteur. La relation de

[1] International Public Law, pp. 182–3.
[2] Etat fédéral et confédération d'états, p. 303.
[3] De la situation des états mi-souverains, p. 181.

suzerain à mi-souverain est fréquemment qualifiée de protectorat."[4]

Boghitchevitch declares suzerainty to denote a species of semi-sovereignty: " Wir glauben deshalb, ohne tätsachlichen Verhältnissen Gewalt anzuthun, das Wort suzerän nicht mehr in lehensrechtlichen Sinne gebrauchen zu mussen, wobei wir freilich den lehensrechtlichen Ursprung bereitwilligst anerkennen, sondern vielmehr den Begriff der Suzeränität lediglich als Teil der Gesamtverhältnisses der Halbsouveränität hinstellen zu sollen, als einen modernen völkerrechtlichen Begriff."[5]

Freund finds the relation that of a community tending towards independence of its superior, and distinguishes it from protectorate: " The fact seems to be that suzerainty is generally the remnant of former sovereignty, while the protectorate is a transitional form, chosen to palliate the new loss of political independence and intended to prepare a more perfect form of political union. The suzerain receives more formal recognition than the protector, but exercises less effective control. Suzerainty is title without corresponding power; protectorate is power without corresponding title."[6]

Hall's opinion agrees with that of Freund, but the former finds in addition a *prima facie* presumption against the independence of the subordinate community: " States under the suzerainty of others are portions of the latter which during a process of gradual disruption or by the grace of the sovereign have acquired certain of the powers of an independent community, such as that of making commercial conventions, or of conferring their exequatur upon foreign consuls. Their condition differs from that of the foregoing varieties of states [i. e. those joined to others by a personal, real, federal, or confederate union] in that a presumption exists against the possession by them of any given inter-

[4] Principes du droit des gens, Vol. I, pp. 52, 80.
[5] Halbsouveränität, p. 102.
[6] Dependencies and Protectorates. Political Science Quarterly, Vol. XIV, p. 28.

national capacity. A member of a confederation or a protected state is *prima facie* independent, and consequently possesses all rights which it has not expressly resigned; a state under the suzerainty of another, being confessedly part of another state, has those rights only that have been expressly granted to it, and the assumption of larger powers of external action than those which have been distinctly conceded to it is an act of rebellion against the sovereign."[7]

Bonfils also discriminates between suzerainty and protectorate, and finds numerous specific rights almost constant in the subordinate state: "L'Etat Vassal n'a qu'une souveraineté amoindrie, dérivant d'un autre Etat, suzerain, envers lequel il est dans un rapport de subordination. Ce rapport peut aller de la dépendance complète à une liberté relative. Comme le protectorat la vassalité est susceptible de degrès nombreux et variés. Néanmoins quelques caractères sont presque constant; la privation absolue de la jouissance et de l'exercise de la souveraineté extérieure (sauf exception très rare); par suite, le respect par le vassal des traités politiques, commerciaux, douaniers, etc., conclus par le suzerain; l'obligation de payer un tribut; la négation du droit de frapper monnaie; l'intervention plus ou moins intense, plus ou moins étendue du suzerain dans la législation, dans l'administration de la justice, de l'armée, de l'instruction publique, dans la construction des voies ferrées ou le creusement de canaux," etc.[8]

McIlwraith hazards the opinion that suzerainty implies a semi-sovereign state subordinate to another, but not openly: "Semi-sovereign states are usually divided into two classes, (1) those which are the subject of a declared Protectorate, (2) those which, although not the subject of a declared protectorate, are yet in a certain condition of subordination with regard to some other state. The latter are designated by international lawyers as vassal states, and the state to which they are subordinate is known as the

[7] International Law, pp. 19, 25.
[8] Droit international public, p. 102.

suzerain power. . . . The principal criterion of this relationship is the question of international representation."[9]

Oppenheim maintains that suzerainty and sovereignty have no connection: "The modern suzerainty scarcely contains rights of the suzerain state over the vassal state which could be called constitutional rights. The rights of the suzerain state over the vassal are principally international rights only, of whatsoever they may consist. Suzerainty is by no means sovereignty."[10]

There are two authors whose treatment of suzerainty deserves especial attention. Both of these writers trace the use of the term from feudalism, but with directly opposite results.

Stubbs holds that suzerainty in the feudal sense, and with all its feudal attributes, still exists. He concludes his article: "It will appear that vassal states are of two distinct classes, nominal and real, that from both classes there are due to the suzerain certain feudal duties; that these duties in no way interfere with or modify the exercise of the rights possessed by the vassal states; that these rights include, in the case of nominal vassalage, both all external and all internal rights, by reason of the nominal vassal being in every way sovereign; that in the case of real vassalage (the class including every vassal state lacking a single sovereign right) the rights, by reason of the non-sovereignty of the vassal, include none that are exterior, and only those interior rights which are expressly granted by the suzerain, and that the special duties engendered by the peculiar relationship are on the part of the vassal, fidelity, service, and respect, and on the part of the suzerain, the obligation to protect and defend the vassal, the duties being correlative and mutual."[11]

Kelke, on the other hand, denies the existence of any connection whatsoever between feudal and modern suze-

[9] The Rights of a Suzerain, Law Quarterly Review, 1896.
[10] International Law, p. 134.
[11] Suzerainty: Mediæval and Modern. Law Mag. and Rev., Series 4, Vol. VII, p. 279.

rainty. Of the relation of vassal to suzerain, he says: "What is essential is that there must be (1) a real restriction of sovereign rights as against the former [the vassal] in favor of the latter, and (2) no *quid pro quo* (or *semble* an obviously and highly inadequate consideration) moving from the latter the suzerain to the former. And (3) in practice it will be found where this is so that (as a matter of fact rather than of law) the convention will be unilateral, i. e. it will be easy for the superior to terminate it, and difficult or impossible for the inferior to do so. Lastly, and above all, (4) the scope and extent of the restriction on sovereign rights will be found in, and only in, the treaty, convention, or other public document whereby the suzerainty is constituted. . . . The modern suzerain has nothing beyond his treaty rights."[12]

Surely the authors whose views have just been cited give to suzerainty a wide field of meaning. The vassal state may be either sovereign, semi-sovereign, or non-sovereign. Most, indeed, of the authors mentioned favor the theory of a semi-sovereignty, but even these are in great disagreement among themselves; some denominate as "vassals" all semi-sovereign states; others divide these into "vassals" and "protectorates." Again, those who make the latter distinction differ widely as to the essential characteristics of each class.

Some of these scientists have discussed suzerainty entirely from the modern standpoint; others have sought a connection between the modern and the feudal situations. Of the latter, all but one have denied such a connection; that one has made the two forms identical.

So much, then, for "suzerainty." The same confusion is to be found in the use of the term "federal state." Below are quoted from various sources definitions of this term.

Le Fur says the peculiar characteristic of the federal

[12] Feudal Suzerains and Modern Suzerainty. Law Quarterly Review, 1896, p. 226.

state is the joint participation of the several subordinate states collectively, and their citizens individually, in the formation of the sovereign will: "Un seul caractère peut être considéré comme appartenant en propre à l'Etat fédéral, c'est l'existence dans cette forme d'Etats, entre l'Etat lui-même et ces citoyens, d'un nouveau facteur coopérant comme les derniers à la formation de la volonté souveraine. Ce nouveau facteur, ce sont les Etats particuliers, qui participent à la souveraineté sous une double forme, tantôt indirectement, par l'intermédiaire de leur représentants, tantôt directement, surtout en matière de révision constitutionelle, grâce à l'existence d'un véritable *referendum* d'Etats, semblable à celui qui existe au profit des citoyens dans les républiques démocratiques. Cette participation de certaines collectivités publiques à la formation de la volonté souveraine existe, on l'a vu, dans tout Etat fédéral; et à l'inverse elle n'existe que là."[13]

Brownson finds sovereignty in the states only as a unit: "While the sovereignty is and must be in the states, it is in the states united and not in the states severally."[14]

Von Mohl declares sovereignty divided between the collective state and its members: "Als Bundesstaat bezeichnet man aber bekanntlich diejenige Vereinigung von Staaten, über welcher eine gemeinschaftliche Regierung mit allen dazu nothwendigen Rechten und Organen besteht, so dass die Selbständigkeit und namentlich die völkerrechtliche Souveränität der einzelnen theilnehmenden Staaten sehr geschmählert ist, und eine durchgehende Theilung der Regierungsrechte zwischen ihnen und der oberen Gesammtgewalt stattfindet."[15]

Woolsey finds the peculiar nature of the federal state in the existence of spheres of independent action both in the central government and in its members: "The two poles of a federal government are independent action of the mem-

[13] Etat fédéral et confédération d'états, p. 673.
[14] The American Republic, p. 221.
[15] Staatswissenschaften, Vol. I, p. 560, ed. 1855.

bers in certain things, and a central power or government which, in certain things, is equally independent."[16]

Sidgwick says: "We thus arrive at the general idea of a 'federal' state, as a whole made up of parts politically co-ordinate and constitutionally separate."[17]

Rüttiman declares the component elements to be individual states, which in certain directions exhibit only collectively the form of a single state: "Der Bundesstaat verbindet eine grössere oder kleinere Anzahl geographisch zusammenhängender Staaten so, dass sie in gewissen Richtungen die Gestalt eines einheitlichen Staates erhalten, während sie im Uebrigen ihr selbständiges und getrenntes Dasein fortsetzen."[18]

Laband holds that the subordinate states exercise a part of sovereignty individually, a part also as a unit: "Die Träger der Landes-staatsgewalt bilden dann zusammengenommen die juristische Person des öffentlichen Rechts, welche das Subjekt der, unter dem Namen Reichsgewalt zusammengefassten, Hoheits- oder Herrschafts-rechte ist."[19]

Waitz recognizes a division of sovereignty between the collective state and the individual states: "Nur da ist ein Bundesstaat vorhanden, wo die Souveränetät nicht dem einen und nicht dem andern sondern beiden, dem Gesammtstaat (der Centralgewalt) and dem Einzelstaat (der Einzelstaatsgewalt) jedem innerhalb seiner Sphäre, zusteht."[20]

Hänel discovers the federal state only in the collective states together with the individual states, all taken as a whole: "Nicht der Einzelstaat, nicht der Gesammtstaat sind Staaten schlechthin, sie sind nur nach der Weise von Staaten organisierte und handelnde politische Gemeinwesen. Staat schlechthin ist nur der Bundesstaat als die Totalität beider."[21]

Moore declares the federal state alone sovereign: "Where

[16] Political Science, Vol. II, p. 167.
[17] The Elements of Politics, p. 507.
[18] Nordamerikanisches Bundesstaat, Theil 1, 54.
[19] Das Staatsrecht des Deutschen Reiches, Vol. I, p. 72.
[20] Gründzüge der Politik, p. 166.
[21] Studien zum Deutschen Staatsrechte, Vol. I, p. 23.

states are united under a central government, which is supreme within its sphere and which possesses and exercises in external affairs the powers of national sovereignty, they are said to form a federal union. 'The Composite State, which results from this league, is alone a sovereign power.' "[22]

Burgess sees but a single state under the federal form of organization: "Federal government is the form in which, as to territory and population, the state is co-extensive in its own organization with the organization of the general government. . . . In the federal system we have one state, one central government and several local governments."[23]

Borel finds the federal state sovereign, but the exercise of sovereignty shared to a greater or lesser degree with subordinate communities: "L'Etat fédératif est un Etat souverain, dont les membres ne sont pas souverains. . . . L'Etat fédératif est donc l'Etat dans lequel une certaine participation à l'exercise du pouvoir souverain est accordée à des collectivités inférieures, soit q'on les adjoigne à l'organe souverain pour la formation de la volonté nationale, soit que, prises dans leur totalité, elles forme elles-même cet organe souverain."[24]

Jellinek holds the subordinate communities to be states, yet non-sovereign: "Ein Bundesstaat ist daher ein Staat, in welchem die souveräne Staatsgewalt die Gesammtheit der in ihrem Herrschaftsbereich auszuübenden Functionen verfassungsmässig derart vertheilt, dass sie nur ein bestimmtes Quantum derselben sich zur eignenen Ausübung vorbehält, den Rest jedoch ohne Controle über die Festsetzung der regelnden Normen, sowie über die Art und Weise der Ausübung selbst, insoferne nur die verfassungsmässigen Schranken eingehalten werden, den durch diese verfassungsmässige Zuweisung von selbständiger staatlicher Macht geschaffenen nicht-souveränen Gliedstaaten überlässt."[25]

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[22] Digest of International Law, Vol. I, p. 23.
[23] Political Science and Constitutional Law, Vol. II, p. 6.
[24] La souveraineté et l'état fédératif, pp. 74, 172.
[25] Die Lehre von den Staatenverbindungen, p. 278.

It will doubtless be assented that neither of the terms that have now been examined conveys any very definite idea or determinate conception. Their value appears to depend almost wholly upon the person who uses them. They are each employed to designate a category of political phenomena; but as to what are the distinctive properties belonging to the respective categories scarcely two authorities are found to agree.

Unfortunately, the terms that have been investigated are fairly typical of the whole terminology provided by political science. The same situation can be shown in connection with other terms. In the course of the exposition of the above expressions there has been incidentally indicated a similarly confused condition of the terms "protectorate" and "confederation." Equal uncertainty is developed by an examination of the nature of a "protected state," "neutral state," "neutralized state," "belligerent community," "sphere of influence," of "real" and "personal unions," and of other terms used to designate various phases of state life.

Such a condition of political science is almost intolerable. A common, definite, and exact use of terms within the science is an absolute essential. Perfect unanimity may never be attained; yet a relative agreement in the use of terms among publicists is necessary to successful collaboration and even to mutual comprehension.

CHAPTER III.

The State According to Constitutional Law.

It has already been said that the theory of an indivisible sovereignty proceeds from that view which regards it as will. Turning first to a consideration of the idea of sovereignty defined as the supreme will of the state, and to a consideration of that conception of the state in which sovereignty is supreme will, we find these inseparable ideas developed in accordance with the classification herein proposed by the analytical jurists, chief among whom are Bodin, Hobbes and Rousseau.

It was Bodin who, in the latter half of the sixteenth century, laid the foundation for a scientific theory of the state. He claims, and with reason it appears, that he is the first writer to attempt accurate definition of political concepts. Not since the time of Aristotle and his "city-state," with its "self-sufficiency" as a mainspring, had such an attempt been made. To the Romans there was but the single Roman state, and a troublesome analysis of this one specimen seems to have appeared to them unnecessary; or perhaps they were too busily engaged in developing its fact to find time for its theory. Their Teutonic conquerors, likewise, seem to have had more genius for political building than for political theorizing. With the growth of the conflict between Church and State, political philosophy had, indeed, once more become a matter of importance; but there were inherent in the period deep difficulties in the way of truly scientific research. The sometimes real, sometimes shadowy, always indefinite authority of the Emperor; the intricate maze of feudal contract binding step by step from Emperor to peasant; the now waxing, now waning, power of the Papacy, here arrogant and there abased before temporal rulers—these were conditions under which

the attainment of fundamental political concepts was well-nigh impossible.

Yet it is not to be supposed that the Middle Ages were entirely devoid of political theorizing. With the rapidly increasing centralization of monarchical power the ancient dispute as to the respective rights of ruled and ruler again became prominent; and thus gave a new impulse to political inquiry. An odd feature of the period is that political doctrine was developed quite as much by churchmen as by laymen; when the latter spoke of the "Prince," the former spoke of the "Pope;" when the latter said the "People," the former said the "Faithful." Yet churchmen and laymen alike fell far short of any broad and scientific treatment of political phenomena.

All authority was conceived during the Middle Ages as emanating from God; therefore the impossibility was manifest of predicating anything absolutely of a mere human institution. All earthly rulers could be only mediately or immediately appointed ministers of the divine power. Their authority was thus what was delegated to them by God only, and could never, of course, be conceived as supreme.

Slowly, however, there was conceded to human society somewhere within itself a *plenitudo potestatis*—a power generally creative of positive law, and limited (if limited be the proper term) only by morality, by divine law, and by the law of nature.

It was the location of this power that henceforth became the subject of controversy. It seems to have been universally considered as belonging originally to the mass of the people, and as being transferred under a governmental compact to the ruler. Although the latter was still regarded as holding indirectly of God, he nevertheless held immediately by virtue of the consent of the people. The sole question, thus, was as to the nature of this transaction between ruler and people. By some writers this was held to constitute a complete and irrevocable alienation of all the power of the people to the ruler—a perfect *translatio;* by

others to constitute a mere delegation of the power of the people for limited purposes and subject to revocation for misuse or breach of the contract by which it was obtained —in short, a simple *concessio.* The question of the true nature of the power was in this way overlooked for the then more immediately important question of its situs. The controversy may be briefly summarized, therefore, in the two phrases of the day, *princeps major populo* and *populus major ipso principe.*

In regard to what was a *princeps* these theorists were not definite in distinguishing between the various grades of the yet existing feudal hierarchy. Similarly indefinite were they in consequence as to what constituted a *populus,* nor for a long time did the term *populus* stand for anything more than the simple sum of the subjects over whom a *princeps* ruled. It was conceived as a multitude of individuals, not as an entity. It is perhaps better translated "public," therefore, than "people." *Populus* was a mere shorthand or collective name, a mere symbol or algebraic sign, bearing no implication of unity. Later, however, the *populus* came to be spoken of as a body—as a person—in, however, an always purely artificial sense. To it was accorded a feigned "personality," a convenient conception borrowed from the civil and canonical law. According to Roman law, or at least to its Italian version, the only real persons are human individuals; but to the *universitas,* or corporation, was attributed a fictitious personality by analogy. Thus it is more correct to say that the corporation was personified than that it was held to be a person. When, therefore, the *populus* was denominated a *persona,* it must be remembered that always and only was meant a *persona ficta.* This fiction theory of the corporation has persisted through the centuries, and it is embodied at this day in the systems both of the civil and the common law; it appears long to have given authors intense satisfaction to draw out the anthropomorphic comparison to great length by finding some corresponding element of the fictitious person to iden-

tify with every member of the human body and every faculty of the human soul.

As contrasted with this scanty and desultory philosophizing of the mediæval writers, the work of Jean Bodin appears almost creative of a new science. By the time his treatise on the state was composed (the first edition was published in 1576), political conditions in France as well as elsewhere had undergone a fundamental change from those of many centuries past. The authority of the Emperor no longer existed so far as France was concerned, absolute monarchy had brought unity out of the chaos of feudalism, and the light of the Renaissance was sufficient to render possible the formulation of a clear distinction between Church and State. Afforded thus in his own country a comparatively unobscured example of state life, Bodin found at hand the material for such a broad and methodical study as had previously been attempted only by the ancient Greeks. The incentive to philosophical analysis also was not lacking; for with the growth of absolute central authority in one person, the significance of the vastness of political power grew constantly more defined, and its justice and rightfulness in consequence more and more exposed to the force of criticism. It was thus upon the sea of mediæval controversy between ruler and ruled, growing more disturbed with the years, that Bodin embarked on the side of monarchical absolutism; yet withal with so fair and open a mind, that it may be doubted whether any subsequent publicist has reached so purely impartial and philosophical a standpoint.

The first words of the *Six livres de la république* constitute a definition on which the whole work of Bodin is based: "République est un droit gouvernement de plusieurs mesnages et de ce qui leur est commun avec puissance souveraine." The formulation and painstaking elaboration of this definition mark truly the beginning of modern political science, for it is not left dependent on dogmatic assertion but is discussed and developed by forceful argument and by multitudinous illustration. The elements of the defini-

tion are in turn defined, their component ideas explained at length, and many of their logical consequences deduced.

Aside from his excellent new method, Bodin's great importance is due chiefly to his treatment of the last term in his definition of the state. He for the first time definitely and formally defined sovereignty as the essential element of the state, the characteristic by which its existence is to be conclusively ascertained. Thus he says: "Of many citizens . . . is made a Commonweale, when they are governed by the puissant sovereignty of one or many rulers; albeit that they differ among themselves in laws, language, customs, religions, and diversity of nations."[1] And that this statement is not incautiously made, but with due refutation of the Greek philosophy, is seen when he continues: "Aristotle hath defined unto us a city to be a multitude of citizens, having all things needful for them to live well and happily withal: making no difference between a Commonweale and a city: saying also that it is not a city if all the citizens dwell not in one and the selfsame place: which is absurdity in matter of a Commonweale."[2] "It behoveth first," however, as Bodin writes, "to define what majesty or sovereignty is, which neither lawyer nor political philosopher hath yet defined: although it be the principal and most necessary point for the understanding of the nature of a state." Wherefore, his formal definition is, in the French edition, "Souveraineté est la puissance absoluë et perpetuelle d'une république;" or, as it stands in the Latin, "Majestas summa in cives ac subditos legisbusque soluta potestas."

Sovereignty, therefore, according to Bodin, is power first of all over the "citizens and subjects of the state." Of these he says: "A citizen . . . is a free subject holding of the sovereignty of another man;"[3] for "every subject is not a citizen, as we have said of a slave; and may also so say of a stranger, who coming into another man's seigniory, is not received for a citizen, having not any part in the rights and privileges of the city."

[1] Op. cit., ed. Knolles, p. 49.
[2] Op. cit., p. 50.
[3] Op. cit., p. 47.

In the second place, sovereignty is perpetual power. However perfectly it may possess all the other characteristics, it is yet not sovereign power unless it be of indefinite duration, which, in the case of its being bestowed upon an individual, is for not less than his life.

Finally, according to the definition of Bodin, sovereignty is power absolute, *legibusque soluta.* In discussing this characteristic he declares that the sovereign need give no "reason of his doings;" that he is "exempted from the laws of his predecessors;" and "much less is he bound unto the laws and ordinances he maketh himself; for a man may well receive a law from another man, but imposible it is in nature for to give a law unto himself, no more than it is to command a man's self in a matter depending of his own will: For as the law saith *'Nulla obligatio consistere potest, quae a voluntate promittentis statum capit:'* . . . which is a necessary reason evidently to prove that a king or sovereign prince cannot be subject to his own laws. And as the Pope can never bind his own hands (as the canonists say); so neither can a sovereign prince bind his own hands, albeit that he would." Sovereignty is not free, nevertheless, from the "laws of God and nature;" for, if princes impugn these, they be "guilty of high treason to the divine majesty, making war against God."[4] "In such sort," he adds later, "that they cannot be from the same exempted . . . but that they must be enforced to make their appearance before the tribunal seat of almighty God."[5]

The sovereign is also bound by contracts made by him either with his subjects or with other sovereigns. The distinction between law and contract Bodin makes quite clear. "We must not then," he says, "confound the laws and contracts of sovereign princes, for that the law dependeth of the will and pleasure of him that hath the sovereignty, who may bind all his subjects, but cannot bind himself; but the contract between the prince and his subjects is mutual, which reciprocally bindeth both parties, so that the one

[4] Op. cit., p. 92.
[5] Op. cit., p. 104.

party may not stand therefrom to the prejudice or without the consent of the other."[6]

In yet another way sovereignty is limited by Bodin, for, "touching the laws which concern the state of the realm, and the establishing thereof; for as much as they are annexed and united to the crown, the prince cannot derogate from them, such as is the law Salique."[7]

In the light of more modern philosophy it might be easy to impute to Bodin the conception of a moral, in place of a legal, sanction to the "laws of God and nature," and to the contracts of the sovereign. It is quite possible that he did have some such idea in a vague and misty way, but the assumption of the existence of any more definite idea is clearly unwarrantable. On the contrary, he expressly regarded what we would term "constitutional law" as above the sovereign power and as a limitation upon it. Clearly, therefore, Bodin fell short of the idea of legal absolutism.

It must be complained here that, as happens with many authors, Bodin's conception of sovereignty is by no means completely expressed in his formal definition. Sovereignty he has described as power most high, absolute, perpetual, and above the law. But of what is the substance of the power the definition does not directly speak. Having opened the way to the heart of the subject, he does, however, reveal its most essential element. "So we see," he finally concludes, "the principal point of sovereign majesty, and absolute power, to consist principally in giving laws, unto the subject in general, without their consent."[8] He says here, to be sure, "consist principally in giving," and he also enumerates a number of other marks or points of sovereignty; but he adds: "Under this same sovereignty of power for the giving and abrogating of the law, are comprised all the other rights and marks of sovereignty: so that (to speak properly) a man may say, that there is but this only mark of sovereign power, considering that all

[6] Op. cit., p. 93.
[7] Op. cit., p. 95.
[8] Op. cit., p. 98.

other the rights thereof are contained in this, viz., to have power to give laws unto all and every one of the subjects, and to receive none from them."[9] Yet, he continues, "The power to make laws is not the proper mark of sovereignty, except we understand thereby the sovereign prince's laws; for that the magistrate may also give laws unto them that are within his jurisdiction, so that nothing be decreed by him contrary to the edicts and laws of his sovereign prince. And to manifest this point, we must presuppose that this word Law, without any other addition, signifieth the right command of him or them, which have sovereign power above others, without exception of person: be it that such commandment concern the subjects in general or in particular: except him or them that have given the law. Howbeit, to speak more properly. A law is the command of a sovereign concerning all his subjects in general: or else concerning general things."

One other characteristic of sovereignty Bodin deduced which is not included in his formal definition. Sovereignty, he says, cannot be divided: "For as a crown if it be broken in pieces or opened, looseth the name of a crown; so sovereign majesty looseth the greatness thereof, if any way be opened to tread under foot any right thereof; as by communicating the same with subjects. . . . It is also by the common opinion of the lawyers manifest, that those royal rights cannot by the sovereign be yielded up, distracted, or any otherwise alienated; or by any tract of time be prescribed against: and thus Baldus calleth them *Sacra Sacrorum,* of Sacred things the most Sacred; and *Cynus Individua* things inseparable, or not to be divided. And if it chance a sovereign prince to communicate them with his subject, he shall make him of his servant, his companion in the empire; in which doing he shall loose his sovereignty, and be no more a sovereign: for that he only is a sovereign, which hath none his superior or companion with himself in the same kingdom. For as the great sovereign God, cannot make another God equal to himself,

[9] Op. cit., p. 162.

considering that he is of infinite power and greatness, and that there cannot be two infinite things, as is by natural demonstration manifest: so also may we say, that the prince whom we have set down as the image of God, cannot make a subject equal to himself, but that his own sovereignty must thereby be abased."[10]

The power of sovereignty that Bodin elaborates he tacitly ascribes to the people. He fully recognizes, indeed, that this power may be perpetually retained by the people; but he also asserts that it may be transferred to a ruler, for he says, "if the people shall give all their power unto anyone so long as he liveth, by the name of a magistrate, lieutenant, or governor, or only to discharge themselves of the exercise of their power: in this case he is not to be accounted any sovereign, but a plain officer, or lieutenant, regent, governor, or guerdon and keeper of another man's power;"[11] but "if such absolute power be given him purely and simply without the name of a magistrate, lieutenant, governor, or other form of deputation; it is certain such a one is, and may call himself, a Sovereign Monarch: for so the people hath voluntarily disseised and despoiled itself of the sovereign power, to seise and invest another therein; having on him, and upon him transported all the power, authority, prerogatives, and sovereignties thereof: as if a man should by pure gift deliver unto another man the property and possession that unto him belongeth: in which case such a perfect donation admitteth no conditions."

It is precisely at this point that Bodin was attacked by the Monarchomachen—a name applied to the anti-monarchic writers of the sixteenth and seventeenth centuries, of whom Johannes Althusius is the most important. Bodin having admitted that sovereignty lay always originally in the people, the Monarchomachen immediately deduced the impossibility of any diminution of this power of the people by the governmental compact or by any other mode of alienation. This contention finally yielded after a long

[10] Op. cit., 155.
[11] Op. cit., p. 88.

struggle before the patent fact of the monarchical absolutism of the times, and its exponents appear now of slight importance in the history of the development of political theory.

It is worthy of note, however, that among these Monarchomachen, and as well among their absolutistic opponents, is first found any considerable use of the term "personality" in connection with the state. It is true that it is not of the state that they speak as a person; it is the people which is thus described. It cannot be claimed that the publicists of this period advanced very far beyond the Mediævalists in respect to the former of these conceptions. The personality of the people remained a purely atomistic, mechanical, creature of the imagination—a body which, save for the convenience of philosophic contemplation, was yet not a body but a mere collection of individuals. The personality of the ruler was nothing more than a personification of the rights and duties of an office.

Thomas Hobbes is the second in point of time of the great trio of analytical jurists. His important political writings, the *De Cive,* the *De Corpore Politico,* and the *Leviathan,* were published just at the middle of the seventeenth century.

Bodin had made sovereignty the characteristic and unifying element of the state; he had declared it to be in essence the power of creating law; he had, moreover, shown it to be perpetual, imprescriptible, and indivisible; but he had not completely freed it from legal limitations. In all these points he has been followed by subsequent writers. It was at the hands of Hobbes that the conception of sovereignty developed by Bodin received its final, highest elevation to absolute legal supremacy. Before examining this theory, however, it is necessary to speak of Hobbes' view of the origin and constitution of the state.

The governmental compact of which mention has been made presupposed an opposition between the ruler and the people. The purely mechanical conception of the mass of individuals called collectively the people has been exposed.

In order that these numerous individuals might form one party to a contract, however, it was obscurely felt that they must in some sort constitute a body capable of unity of action. It has been pointed out that to this end use was made of a pure fiction; but the personality thus feigned was ascribed to an equally feigned body whose determinateness was apparently accepted as an existing fact. For many centuries the theory of divinely instituted authority was sufficient to account also for the determinateness of its subjects, but by the middle of the seventeenth century there had been developed from certain passages in the Bible and from Greek and Latin mythology the idea of a state of nature precedent to the state of civil society. In that state of nature men were governed by the law of nature, which was given to each man by his own right reason, and was interpreted by each for himself; there was thus nought in common between men, but on the contrary there existed a condition of complete individualism. Now the idea having been abandoned that the individuals (denominated a people) were divinely determined, and the situation premised that there was no natural bond of unity, and none prior to the institution of civil authority, it became a logical necessity to discover some factor that would reduce the multiplicity of the people to unity.

In speaking of the theories of the Middle Ages it has been said above that the people was then described as a *universitas*—a corporation. It has also been pointed out that the Italian conception of the *universitas* ascribed to it only a fictitious personality or unity; and it is probable, as Professor Maitland has suggested, that the corporate idea was now completely rejected, because it was seen that a fiction was not a logical explanation of an assumed fact. At all events, political theory for the next two centuries turned exclusively to the idea of a *societas,* which in Latin signifies simply a partnership, a union based on contract.

Thus Hobbes, having premised a state of nature in which each man's actions depend solely upon his own will, finds that no action can be ascribed to a multitude of men in

this state, but only the same action to many men. "By multitude," he explains, "because it is a collective word, we understand more than one; so as a multitude of men is the same with many men. The same word because it is of the singular number, signifies one thing, namely, one multitude. But in neither sense can a multitude be understood to have one will given to it by nature, but to each a several; and therefore neither is any one action whatsoever to be attributed to it. Wherefore a multitude cannot promise, contract, acquire right, convey right, act, have, possess, and the like, unless it be every one apart, and man by man, so as there must be as many promises, compacts, rights, and actions, as men. Wherefore a multitude is no natural person. But if the same multitude do contract one with another, that the will of one man, or the agreeing wills of the major part of them, shall be received for the will of all; then it becomes one person."[12]

Yet the multitude in itself can be no more than a simple multitude; only in the person of its ruler does it become an entity. Its personality has, apart from the ruler, in and of itself, no existence; for, as Hobbes writes, "That the people is a distinct body from him or them that have the sovereignty over them, is an error. . . . When men say, *the people rebelleth,* it is to be understood of those persons only, and not of the whole nation. And when the people claimeth anything otherwise than by the voice of the sovereign power, it is not the claim of the people, but only of those particular men, that claim in their own persons."[13] But not even in conjunction with the ruler does the people constitute a *real* body, for "a multitude of men are made *one* person, when they are by one man, or one person, represented; so that it be done with the consent of every one of that multitude in particular. For it is the *unity* of the representer, not the *unity* of the represented, that maketh the person *one.* And it is the representer that beareth the person, and but one person: and *unity,* cannot otherwise

[12] *De Cive,* Chap. VI, 1, Note.
[13] *De Corpore Politico,* Part II, Chap. VIII, 9.

be understood in the multitude."[14] Hence, unity, bodiliness, and personality are qualities that do not pertain to the people in any real sense, but are only feigned of them and are represented by the like qualities in the ruler.

In developing the idea of a covenant of every man with every man in a state of nature as the origin of authority, Hobbes negatived completely the old idea of a compact between the multitude, feignedly acting as a body, and the ruler. According to his conception of the contract, it is "as if every man should say to every man, 'I authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner.'"[15] Hence it may be seen that, according to this form of covenant, authority is established by the very formation of society; and no further contract is needed, or is even possible, with the person or persons who are invested with this authority. This is a deduction from the premise that in point of time democracy is always the first form of government, usually followed by aristocracy as the second, and, normally, by monarchy as the last. "In the making of a democracy, there passeth no convenant between the sovereign and any subject. For while the democracy is making, there is no sovereign with whom to contract. For it cannot be imagined, that the multitude should contract with itself, . . . to make itself sovereign; nor that a multitude, considered as one aggregate, can give itself that which before it had not."[16] "To make an aristocracy, there is no more required to the making thereof but putting to the question one by one, the names of such men as it shall consist of, and assenting to their election; and by plurality of vote, to transfer that power which before the people had, to the number of men so named and chosen."[17] "And from this manner of erecting an aristocracy, it is

[14] *Leviathan,* Part I, Chap. XVI.
[15] *Leviathan,* Part II, Chap. XVII.
[16] *De Corpore Politico,* Part II, Chap. II, 2.
[17] *De Corpore Politico,* Part II, Chap. II, 6.

manifest, that the few, or 'optimates,' have entered into no covenant with any of the particular members of the commonwealth, whereof they are sovereign. . . . Further, it is impossible, that the people, as one body politic, should covenant with the aristocracy or 'optimates,' on whom they intend to transfer their sovereignty. For no sooner is the aristocracy erected, but the democracy is annihilated, and the covenants made unto them void."[18] It will thus be seen that the old conception of a governmental compact was entirely replaced with Hobbes by his idea of a social compact, and that the people can have no rights as against the sovereign. To quote again: "It is most manifest by what hath been said, that in every perfect city . . . there is a supreme power in some one, greater than which cannot by right be conferred by men, or greater than which no mortal can have over himself. But that power, greater than which cannot by men be conveyed on a man, we call *absolute*. For whosoever hath so submitted his will to the will of the city, that he can, unpunished, do anything, make laws, judge controversies, set penalties, make use at his own pleasure of the strength and wealth of men, and all this by right; truly he hath given him the greatest domain which can be granted."[19]

Thus is Hobbes led to his definition of law: "The civil laws are the command of him, whether man or court of men, who is endued with supreme power in the city, concerning the future actions of his subjects."[20] He also says, "Every civil law hath a penalty annexed to it;"[21] whereby he clearly distinguishes it from the laws of nature, divine laws, and international laws.

In the doctrines of Hobbes are contained in express terms the principles of sovereignty and law whose subsequent confirmation and elaboration was so brilliantly begun by Jeremy

[18] *De Corpore Politico*, Part II, Chap. II, 7.
[19] *De Cive*, Chap. IV, 13.
[20] *De Cive*, Chap. XIV, 2.
[21] *De Cive*, Chap. XIV, 8.

Bentham, and so thoroughly completed by John Austin. In essentials, however, it cannot be maintained that either of these jurists added very much to the political theory of Hobbes. With them, as with Hobbes, there is a complete identification of government, state and sovereign.

Just as the idea of sovereignty developed by Bodin in behalf of monarchical government was seized upon by the Monarchomachen and claimed as a possession of the people at large, so was Hobbes' conception of sovereignty carried over from ruler to people by subsequent writers, among whom may be mentioned Locke and Rousseau, but the latter above all.

John Locke in his "Two Treatises of Government" does not deny the existence of an absolute legislative power in the government, but he holds that there exists in the people a second, absolute power to determine who shall constitute the government. Thus he says: "Though in a constituted commonwealth, standing upon its own basis, and acting according to its own nature, that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate; yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them. . . . And thus the community may be said in this respect to be always the supreme power, but not as considered under any form of government, because this power of the people can never take place till the government be dissolved. In all cases while the government subsists, the legislative is the supreme power."[22] This is an expression of Locke's well-known doctrine of revolution. What Locke did not see was that the exercise of such a power as he ascribes to the people was in fact destructive of the existing state.

The difference between state and government that Locke

[22] The Second Treatise of Government, 149, 150.

had so nearly grasped was finally set forth by Jean Jacques Rousseau. Hobbes' idea of a social compact as the origin of the state was accepted by Rousseau, as was the resulting creation of absolute sovereignty, but with this distinction: whereas Hobbes conceived the substance of this contract to be an agreement of each man with each man to submit in all things to the will of a third person, Rousseau held this contract to be an agreement by each man with each man to submit to the will of all or of the whole. The creation of government became in this way with Rousseau an act separate from the creation of a state, and was not strictly a compact at all but a simple commission; and thus was finally established that most important distinction of state and government.

Hobbes had thought of sovereignty as present only in the government—it was incapable, indeed, of existence elsewhere; even Locke had not denied its possession to a government which was, it is true, liable to deposition for its misuse. Rousseau, on the other hand, positively denies all sovereignty to the government in any sense whatsoever. In fact, the government, according to Rousseau, possesses no power of command at all; it is merely the executive agent ordered by the state to carry out the commands of the state. Consequently, the social compact takes with Rousseau this form: "We, the contracting parties, do jointly and severally submit our persons and abilities, to the supreme direction of the general will of all, and, in a collective body, receive each member into that body, as an indivisible part of the whole." "This act of association accordingly converts the several contracting parties into one civic, collective body, composed of as many members as there are votes in the assembly, which receives also from the same act its unity and existence. This public personage, which is thus formed by the union of all its members, used formerly to be denominated a City, and at present, takes the name of a republic or body politic. It is also called, by

its several members, a *State,* when it is passive; the *Sovereign,* when it is active."[23]

This is the ultimate effort to turn a multitude of individuals into one body by means of a contract. The body, even in the hands of Rousseau, breaks down into a mere mass of individuals when he attempts to ascribe to it a "general will." This general will is determined quite simply by a majority vote in which each citizen has an equal right of suffrage. To avoid the too evidently mechanical nature of the concept thus arrived at, Rousseau argues as follows: "When a law is proposed in the assembly of the people, they are not precisely demanded whether they severally approve or reject the proposition, but whether it be conformable or not to the general will, which is theirs as a collective body; each person, therefore, in giving his vote declares his opinion on this head, and on counting the votes, the declaration of the general will is inferred from the majority."[24] Now as to whether Rousseau's body of citizens can be logically idealized or whether it is itself a pure fiction, it is evident from the quotation just made that, avoid the term as he will, the general will that he propounds is by his own statement clearly and simply proved a fiction. For either the decision of the greater numerical portion of the sum of particular wills must be a term fully convertible with that of the general will, or else it must be simply *regarded as* the general will through the purely artificial means of a clause in the original social compact. Here, therefore, is a complete, and it would appear final, breakdown in the logical continuity of the attempted creation of a volitional entity through the action of individuals.

During the past century the most important and progressive work in analytical theory has been done by German scholars. To the conception of sovereignty as supreme will little if anything has been added; but in the idea of the state a radical change has been wrought. Indeed, from the

[23] Du contrat social, Book I, Chap. VI, ed. Barber & Southwick.
[24] Op. cit., Book IV, Chap. II.

most modern point of view, the idea of the "state" was previously non-existent; for the older writers applied this term to the people or to the ruler, or to the two together, but in no instance rose above a thoroughly concrete conception; whereas the state is now conceived as an abstraction, something over and above its physical members. The development of this new theory of the state is a phase of a broad movement toward a new conception of the body corporate.

During the fifteenth and sixteenth centuries German law was almost completely displaced in its own home by Roman law, such at least as had been developed by the Italian commentators. The first half of the nineteenth century, however, saw a reaction quite as severe in favor of Germanism. The elements of German law were to be resurrected, and a new, intensely Germanic system created.

One of the first points of German law to suffer attack was its adopted theory of the *universitas*. Georg Beseler in 1843 declared that by no fiction could the corporate life of bodies such as the German agrarian communities be explained. Since that time writer after writer in Germany has grappled with the problem of the true nature of "bodies" composed of human individuals; and from their united efforts to better old theories a large measure of success has been attained.

With German slowness and thoroughness has been developed, or perhaps it is better to say is being developed, a conception of the corporation as a person not fictitious but real, and possessed of a true will of its own. This person is not a mere collection of individuals bound together by a formal tie of some description, nor is its will merely the summation of particular wills. Personality is a psychical, as well as a physical, quality; the corporation is not simply so much flesh and blood; but it is so much flesh and blood unified by a common purpose. And this, it is claimed, is unity—real, true, undeniable unity—no fiction, no artifice, no contract to be such, no creature of the law! The aggregate of men thus united, it is held, is just as certainly and

really a person as is the collection of members and qualities which make the human being. It rests, it is true, in part on physical elements. It could not exist, nevertheless, without its psychical elements, for their withdrawal would at once reduce the unity to a mere mass or multitude of units. These psychical elements of purpose and will belong to the corporation, not to its members; for from the addition of private wills nothing can be derived but a sum of private wills. The will of the corporation, however, is something apart from the wills or from any combination of the wills of its individual members.

The application of this doctrine of the corporation to bodies political is seen to be in some sense a reversion to the ideas of the Middle Ages; but, on the other hand, it contains in it the element of *real unity,* the absence of which from the mediæval conception of the corporation turned political thought for centuries into the errors of contractualism. Under this theory of real collective personality the state differs from other corporations only in that its will is supreme.

In the light of the latest theory of the analytical jurists, therefore, the state is a corporate person, an entity analyzable into, but distinct from each of the following elements: (1) Its members, who are collectively the people and individually the citizens or subjects; (2) its supreme will, or sovereignty; (3) its determinate organ for the expression of its will, called the sovereign, which organ, together with all the machinery which it employs for the execution of the supreme will, is included in the government.

CHAPTER IV.

The State According to International Law.

That conception of sovereignty and of the state which admits the divisibility of the former belongs to what is here denominated the international theory, by reason of its acceptance by so many writers on international law. Although the phrase "semi-sovereignty" is comparatively recent, the idea for which it stands is coeval with the origin of international law. The genesis of the latter, then, it is necessary briefly to review.

With the almost complete disappearance during the fifteenth and sixteenth centuries of the already greatly diminished power of the Holy Roman Empire, the last restraint of external authority was removed from the liberty of the lesser European rulers in the conduct of their relations with one another. Between the character of international intercourse during the Middle Ages and during the subsequent period there is an absolute lack of fundamental likeness. Shadowy as may have been the power of the Emperor actually, he was, in theory, an authority superior to the other lords of Europe so far as concerned the dealings of the latter with one another. When that authority was finally repudiated, the states of Europe stood for the first time in ten centuries openly face to face with each other as powers uncontrolled by the mediation of a common superior. Each was entirely free to act toward its neighbor in accordance with its desire and ability.

It was not to the task of explaining the relations actually subsisting between the nations of Europe, but to that of developing the nature of the relations that should exist, that political philosophers set themselves at this period. With a phenomenal success these writers formulated a system of rules regulating the conduct of states *inter se*, which

was actually to a great extent adopted, and which, though its specific provisions have often altered, yet does, at the present day, receive universal recognition throughout the civilized world.

Among the first to produce more or less comprehensive treatises upon the subject of international law must be mentioned Ayala and Gentilis. The first to put his work into such shape that it was accessible to others than students, however, was Hugo Grotius, who in 1625 published his famous *De Jure Belli ac Pacis.* The immediate and tremendous influence of this book was due, besides its popular form, on the one hand to the pressing need of relief from conditions then existing, and, on the other hand, to the reasonableness of its proposals, backed as they were by a remarkably erudite appeal to ancient authority, which was always effective to the mediæval and early modern mind, and which was peculiarly appropriate to this subject.

It is to the ancient conception of a law of nature that Grotius turned in order to lay a philosophical foundation for his system. He premises an original condition of mankind in a state of nature, in which, unlike Hobbes, he finds law existing antecedent to any political organization. Although Grotius speaks always of this law of nature as *jus,* he disregards the distinction already drawn by other writers between *jus* and *lex.*[1] Hence, he divides all law into *jus naturale* and *jus voluntarium,* the former of which proceeds from the understanding,[2] the latter from the will.[3] Grotius conceives international law as drawn from both sources, i. e., international law necessarily includes the law of nature, but it may have additional elements added through positive treaty or established custom. It is from the law of nature, however, that Grotius avowedly derives his principles. The law of nature he conceives to be solely the dictate of right reason.[4] From his own reason, therefore,

[1] *De Jure Belli ac Pacis,* I, 1, 9; trans. from ed. Prodier-Fodéré.
[2] Op. cit., I, 1, 19.
[3] Op. cit., 8, 1, 13.
[4] Op. cit., I, 1, 19, 1.

as that of a normal man, he deduces a number of rights and duties binding upon individuals in the state of nature. Man, however, is naturally and irresistibly impelled to political society.[5] As to whether this impulse is sufficient in itself to account for the existence of political society, or whether there is necessary also an express or implied contract, Grotius appears undetermined. The point is immaterial. Civil society having been established, the natural rights of the individual are suspended, in part at least, by civil law. "It is true that all men have naturally, as we have said above, the right to resist or repulse any injury that one does them. But civil society having been established to maintain order, the state acquires over us and over that which belongs to us, a kind of superior right, in as much as such is necessary to its end. The state may, then, for the sake of the public peace and tranquility, deny this common right of resistance; and it is not to be doubted that it has so willed, since it could not otherwise attain its end."[6]

Although the natural rights of the individuals within the political community have thus been subordinated to another law, yet in the whole community of which the individuals are members there still inhere all the rights and duties decreed by the law of nature. Like individuals, these communities are possessed by natural law of rights and duties of both peace and war; and although the right of private war is extinguished, there yet remains the right of public war, which Grotius defines as that made by the authority of a "civil power."[7]

While it may be doubted whether international law would have attained a positive influence upon the actions of states without this original claim of its transcendental validity, it is quite certain that this claim is now plainly denied. Pufendorf, Wolff, Vattel, and their contemporaries treated international law as derived from the law of nature, a view

[5] Op. cit., Proleg., VI.
[6] Op. cit., I, iv, 2, 1.
[7] Op. cit., I, iii, 1, 1.

in which even such late writers as Phillimore[8] and Bluntschli[9] have concurred.

Since the middle of the eighteenth century, when Moser declared the rules of international law to be derived solely from the customs and conventions of nations, no other sources have been generally acknowledged, however influential "right reason" may yet be in the determination of those customs or conventions.

The transcendental origin of international law being denied, the question next arises whether or not so-called international law is strictly speaking law at all. This question, however, is not of serious import; the likeness and unlikeness of international law to municipal law is quite generally agreed upon. International law has in common with municipal law the nature of a rule of conduct, but it lacks the latter's characteristic of imposition under an express sanction by a political superior. It is immaterial whether the term "law" shall embrace only that which possesses both elements or shall be extended sufficiently to include that which has but the one. Usage may here be conveniently permitted to decide the question, and the phrase "international law" is of practically universal currency. Lawrence says: "International law may be defined as the rules which determine the conduct of the general body of civilized states in their dealings with one another."[10] So Bonfils holds: "Le droit international public (ou Droit des gens) est l'ensemble des règles qui déterminent les droits et les devoirs respectifs des Etats dans leurs mutuelles relations."[11] Or as Calvo calls it: "En d'autres termes, l'ensemble des obligations mutuelles des Etats, c'est-à-dire des devoirs qu'ils ont à remplir et des droits qu'ils ont à défendre les uns à l'égard des autres."[12]

These definitions serve also to indicate the nature of the "subjects" or "persons" of international law, or as Rivier

[8] International Law, I, p. 15.
[9] *Völkerrecht*, 1.
[10] Principles of International Law, p. 1.
[11] Droit international public, p. 2.
[12] Droit international, p. 93.

says, of " states, nations, peoples, powers," for " these words are synonymous."[13]

The older writers failed to define these persons. Thus Grotius writes: " The state is a perfect union of free men associated for the protection of law and for the common good."[14] This vagueness has since given way, however, so that there are now a great number of scientific definitions of the state by international publicists.

These definitions vary considerably. That of Bonfils is: " L'Etat (au point de vue du Droit international public) est une réunion permanente et indépendante d'hommes, propriétaires d'un certain territoire, associés sous une autorité commune, organisée dans le but d'assurer à tous et à chacun l'exercice de sa liberté et la jouissance de ses droits."[15] Lawrence says: " A political community, the members of which are bound together by the tie of common subjection to some central authority, whose commands the bulk of them habitually obey;"[16] Rivier, " Une communauté indépendante, organisée d'une manière permanente sur un territoire;"[17] Phillimore, " For all the purposes of international law a state (*dēmos, civitas, volk*) may be defined to be a people permanently occupying a fixed territory (*certam sedem*), bound together by common laws, habits, and customs into one body politic, exercising through the medium of an organized government independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all international relations with the other communities of the globe."[18]

Through the variation of these definitions certain elements stand out as essential to the state in the general opinion of international jurists. These elements are government, independence, sovereignty, territory and people.

[13] Principles du droit des gens, I, 3.
[14] Op. cit., I, i, 14, 1.
[15] Op. cit., p. 83.
[16] Op. cit., p. 56.
[17] Op. cit., p. 45.
[18] International Law, 3d ed., I, 81.

The government is the representative and agent of the state for the exercise of its rights and powers of sovereignty and independence.

Between independence and sovereignty international lawyers make but an indifferent distinction. One or both are generally recognized as essential elements of the state. The position taken by Grotius in recognition of the final dissolution of the Holy Roman Empire was that a sovereign state should be independent. When Grotius had declared that rights and duties pertain to certain groups of men in the dealings of such groups with one another, it became necessary for him to determine the nature of the subjects or holders of such rights. Accordingly he says: "A civil power" [i. e., a state] is "that authority which has the sovereign power,"[19] and "that power is sovereign whose acts are independent of the volition of another, in such a way that they may not be annulled by any other human will."[20]

The Holy Roman Emperor had stood at the head of a hierarchy that was organized on a territorial basis. With the repudiation of his authority, all that territory that had possessed a certain unity under the Empire was disintegrated. It was divided up into many lands, and each was henceforth under a separate supreme authority. But the whole complicated tissue of contract that had bound individuals together step by step from peasant to Emperor had weakened with the decay of the Empire itself. The rights of many lords over lands were as shadowy as those of the Emperor. It was by no means always, therefore, that the authority of those who had under the old system stood next below the Emperor was acknowledged when his overlordship was finally denied. Hence it was necessary for Grotius to determine in which of these lords lay an authority that should cause the community under him to be properly recognized as the bearer of the rights and duties of nations. Such, accordingly, he declared to be only those that were possessed of sovereignty.

[19] Op. cit., I, iii, 5, 7.
[20] Op. cit., I, iii, 7, 1.

The authority of these lords had, however, been attained under the feudal system, wherein it was attached to a certain domain in lands. The principles of territorial sovereignty—the absolute sovereignty of the state over every inch of its territory to the absolute exclusion of the sovereignty of any other state—seems a natural conception in modern thought. Such was far from being the case, however, with the ancestors of those European peoples who created the system of international law. The political ideas of the Germanic tribes that overran the Roman Empire appear to have comprehended only the conception of tribal or personal sovereignty. These tribes were nomadic, and they naturally did not attach any political significance to their usually temporary occupation of land. They were under the sovereignty of their tribe whether within the territory momentarily held by that tribe or not, and were everywhere governed by its laws. On the other hand, the mere fact that others dwelt within that land did not render them subject to the laws of that tribe. Even after these tribes had acquired permanent abodes in western Europe they appear for a long time to have regarded themselves as merely encamped on the lands that they occupied. These lands, however, were apportioned by the higher chiefs to lesser leaders for their enjoyment and government, with the stipulation of certain service in return. Thus there was a contract. He to whom the land was originally allotted did not acquire an absolute property therein, but only certain rights guaranteed by his superior in return for the fulfillment of certain duties; he in turn might transfer some portion of these rights to men holding similarly of him, and so on indefinitely. Even the chiefs who made the original grant seem to have claimed no complete ownership of the lands either in themselves or in their tribes, but only to have asserted rights in it. The idea of the universal and eternal dominion of the Roman Empire appears to have laid such fast hold upon the minds of the barbarians that even after they had conquered vast lands from that Empire they seem to have been ever satisfied with the recognition

in themselves of certain rights. The circumstance that these rights in land attached to the rulers and leaders of the people led gradually to a complete identification of political rights with relations to land—the so-called process of feudalization.

With the decline of feudalism great lords who had stood in a double relation of rights and duties, on the one side to those holding lands of them, on the other to those of whom they held lands, often found the latter relation become purely nominal. Their rights were not efficiently protected nor their duties successfully demanded. Since, then, the lands over which they ruled were subject in practice to the exercise of no rights save those that proceeded from these rulers themselves, to the latter it became easy to ascribe absolute proprietorship. This conception was readily accepted by the founders of international law, for it was entirely compatible with the doctrine of *dominium* in the old Roman system of *jus gentium,* from which has been derived the greater number of the principles of modern international law. This independent possession of land was therefore adopted into international law as essential to him in whom was recognized sovereign power.

Sovereignty is thus conceived as inseparably connected with the possession of a fixed territory. So fundamental, indeed, is regarded the principle of territorial sovereignty in international law that at the present day it is deemed necessary to explain any exception to it as a fiction. No community is recognized in international law as a state that has not fixed and permanent territory. Thus Rivier says: "Le territoire est un élément essential de l'Etat. . . . Il est impossible, d'après la définition même de l'Etat, de concevoir un Etat dépourvu de territoire."[21]

As a consequence of the emphasis placed by international law on the element of territory in the state, the body of individuals subject to the state received but scant attention. So far has the international conception of a "people" travelled

[21] Op. cit., pp. 155–6.

from the old Germanic one of a "clan" or "tribe" that it signifies but little more than the population of the territory of the state. Tentative theories of unity in the people of a state of another nature than residence in a common country have not been widely accepted. The theory of nationality or race, supported by many Italians following Mancini, receives but slight credit. "The postulate is fundamental that jurisdiction and territory are co-extensive."[22] All persons within the territory of the state are subject to the sovereignty of the state, and that sovereignty does not follow them into the territory of another state. It is true that, in return for their allegiance to a particular country, that country may undertake to secure their protection when abroad, but no exercise of sovereignty by their own country over them in another country is recognized by international law.

Writers on international law are apparently under a little difficulty in reconciling their conception of territorial sovereignty with certain activities of the state. All the powers of the state are not confined in their exercise to its territory. Its powers are exercised both internally and externally. Accordingly, some writers speak of internal and external sovereignty. Others make the same distinction when they speak of sovereignty and independence.[23] Other writers, again, make no distinction between these terms. Moore says, "The words 'sovereignty' and 'independence' are often used by writers on international law as practically synonymous terms."[24] So Rivier says, "L'indépendance de l'Etat est sa souveraineté même, envisagée de l'extérieur."[25] Nor, indeed, do those who contrast external sovereignty with internal sovereignty, or independence with sovereignty, regard these two as distinct things, but only as two aspects of the same thing. Lawrence writes, "This right of independent action is the natural result of sover-

[22] Taylor, International Public Law, p. 197.
[23] Bonfils, op. cit., p. 164. Wheaton, Elements of International Law, 20–21, ed. Dana.
[24] Digest of International Law, p. 18.
[25] Op. cit., p. 280.

eignty—it is, in fact, sovereignty looked at from the point of view of other nations."[26] Bonfils says, "Comme le remarque M. Pradier-Fodéré, les expressions employées s'appliquent aux aspects divers d'un même attribut."[27] It may be concluded, therefore, that there is no general distinction between the conceptions of independence and sovereignty in the international theory.

Sovereignty or independence is defined, as regards its substance, either as composed of powers or of rights. As has been seen from the foregoing, Wheaton speaks of it as "the supreme power by which any state is governed." Lawrence, on the other hand, says, "Independence may be defined as the right of a state to manage all its affairs," etc.[28] Rivier writes, "Qui dit souverain, dit indépendant. . . . On peut définit le droit d'indépendance," etc.[29] As far as can be seen, there is no intention on the part of these writers to draw a distinction between the "powers" and the "rights" of a state. The terms are used synonymously in all essentials at least.

The international theory of sovereignty, then, is that it is a number of rights or powers. As Maine puts it: "The powers of sovereigns are a bundle or collection of powers, and they may be separated one from another."[30] Hence, it is possible to conceive of a division of these powers or rights, of a deprivation of one state by another of the exercise of one or more of them. Grotius explicitly recognized the possibility of such a situation[31] inconsistently, it may be remarked, as he had already declared sovereignty indivisible.[32] The designation "halb-souverän" was applied by Moser to states that have been deprived of some of their sovereign rights, and has been widely adopted, though often with an apparent lack of content.

[26] Op. cit., p. 111.
[27] Op. cit., p. 135.
[28] Op. cit., p. 111.
[29] Op. cit., p. 280.
[30] International Law, p. 58.
[31] Op. cit., I, iii, 21, 10 and 11.
[32] Op. cit., I, iii, 17, 1.

The validity of the conception for which the phrase stands, however, is completely asserted by the international school. Thus Rivier writes: "L'utilité, la necessité même a fait admettre l'existence d'une souveraineté imparfaite, à laquelle on a donné le nom, nullement irréprochable, de mi-souveraineté."[88]

[88] Op. cit., p. 80, and also Lawrence, op. cit., p. 67.

CHAPTER V.

Criticism of the Constitutional Theory.

The starting point of analytical theory has always been the municipal law. It is the law of the land that is its absorbing topic—the law made by an authority commonly recognized in the community as the highest objective source of obligatory rules of conduct. Bodin was chiefly concerned with the obedience due by subjects to the commands of their kings. The English jurists, with a rather broader viewpoint, extended a like inquiry to all forms of government, and the scientists of today have drawn their conception of the state largely from their legal studies upon the nature of the corporation. Always it is the law that comes from within the group, from within the community, of which some phase under investigation leads to a development of the analytical theory of sovereignty.

Sovereignty is sometimes spoken of by analytical writers as the one essential element of the state. It is obvious that this cannot be taken literally, for these same writers themselves recognize the necessary existence of other attributes in the state. Yet it is true that so great is the importance attached by them to the sovereignty of the state that sovereignty and state have, in one instance at least, been conceived as synonymous terms.[1] Sovereignty, these writers say, is supreme will—legally supreme will, that is—and this legal supremacy is the one characteristic of the will of the state. In this lies a grave error, for will means purpose, and purpose may be manifested in other forms than of commands. Thus, the "will" of the state is broader than the "sovereignty" of the state, for legal supremacy

[1] Professor Burgess, Political Science and Constitutional Law.

is but one phase or direction of the will of the state, and, as the sovereign, the state is viewed in but one of its aspects.

The analytical school is fully agreed that sovereignty is will and nothing but will. If that will express law only, then it is exerted solely in abstract commands. An abstract command can be addressed to no other than a rational creature. It follows that sovereignty cannot be exercised over irrational beings nor over inanimate matter, for example, over land. Yet to assert that the state exerts no will toward its territory is absurd.

Moreover, even a manifestation of the will of the state is not always law to all to whom its desires may be directed. Law depends for its character not solely upon its source, but as well in part upon the persons to whom it is addressed. The command of the state is law only to its subjects. Now, no matter how one may care to define this term "subject" in its legal sense, it will hardly be contended that Great Britain, for instance, comes within the category of "subjects" of our own country. Yet it will not be denied that in the Venezuelan affair, and in the continued maintenance of the Monroe doctrine, the United States has exhibited no doubtful manifestation of its will toward Great Britain.

The command of the state even to its own subjects is not always law. The mandate of the United States concerning interstate extradition, incorporated as it is in the Constitution, is yet lacking the character of law because there is no provision for its enforcement. Yet that the command is an utterance of the will of the state will scarcely be disputed.

It is apparent, therefore, that sovereignty is not synonymous with the will of the state, but is narrower in its significance. It is also apparent that the state itself is something more than merely the sovereign, something more than merely the source of law.

Several assertions have thus far been made involving the nature of law. It has been said that law is expressed in abstract commands, that it issues from a definite organ of the state, that it is addressed to the subjects of the state, and that it contains a provision for the enforcement of its

commands. It is necessary, then, to set forth plainly what is meant by the term "law."

A law may be defined as a specific command or rule of conduct enunciated by a definite organ of the state for the government of its subjects, whose obedience is required and sanctioned by a provision for the employment of the force of the state to secure its execution or to punish its breach.

The analytical concepts, as they have already been set forth, are state, sovereignty, government, and body politic. Sovereignty is a supreme legal will; the state is its real possessor; the government is its organ; and the body politic its subject.

The body of the state, or the people as it is conveniently termed, is composed of a number of individual human beings viewed from a legal standpoint, viz., as subject to the legal will of the state. These individuals may in many respects be a mere aggregate, an inarticulate horde. But in one aspect they must possess oneness; as an element of the state they must constitute a legally organized unit.

The personality of the state differs from that of the human being in that its body is discrete and not concrete. The body of the state consists of the spatially disconnected bodies of its individual members. On the contrary, however, the legal will of the state contains no portion of the sum of the individual wills. The latter do not, either in their entireties or in their like parts, participate in the sovereignty. It may actually be the will of the individual to perform the action required of him by the state or to govern his body in accordance with its commands; yet the will of the individual thereby only abets the sovereign will and does not share in its functioning. The legal will of the state may be conditioned by the wills of the subjects of the state, but it is not composed of their wills.

Sovereignty, as regards its location, is therefore not to be found in the individual members of the body politic. Modern authors who hold the organic theory of the state do indeed contend for the existence of a corporate will which rests in the members of the community as one whole.

Admitting, if one chooses, the validity of this theory, it yet does not affect the conception of sovereignty as the supreme legal will of the state; for law is that which issues from a definite organ of the state, and commands of this origin would at best but approach the dictates of the general will, and even in the event of their absolute coincidence legal character would be acquired only through their acceptance by this organ of the state and not through a general volition. A general will, if such exists, might, like the individual wills, condition but not constitute sovereignty.

The supreme legal will of the state must, however, have a physical habitation, which is found in a separate organ of the state called the government. Thus to constitute the state a legal person there is required this third attribute—an *organ* of will which, however, in the individual is not localized apart from his own body.

It is one of the functions of the government, then, to determine the legal will of the state. In this it may be guided by any motives whatever. The self-interest of officials, expediency, the fear of violence either external or internal, even force actually applied, may influence the decision of the sovereign organ. The government may accept some principle of conduct already formulated, as, for example, a law of a conquered foe, or a mercantile custom, or a rule of international law; or, on the other hand, it may evolve some idea out of its own consciousness. In this sense the source of law is immaterial. It is not the origin of its content, but the origin of its form, that is of essential consequence. It is the formal validity which can be given only by the sovereign organ of the state.

For whatever reasons and by whatever means determined, the conduct demanded of its subjects by the state requires publication in order that the legal will of the state may be known. For, since this will and the body of the state are physically discrete, as pointed out above, this will cannot be communicated to the body politic in the same way as the human will is communicated to its body, that is to say, through some unexplained correlation of the psychical and

physical within the human brain. Sovereignty can be exercised, therefore, only in publicly announced commands.

The state may will actions as diversely numerous as does the human being. It does not, as a rule, however, govern by specific, or occasional commands. Since, as has been shown, the organic communication of volitional impulse from the governmental to the people is an impossibility, the will of the state and its body cannot have that direct and immediate intimacy that exists in the case of the individual human being. Constant and instant communication is not possible. Hence, the legal will of the state usually exerts itself in more stable commands, which fall into the form of durable rules of conduct.

A law is always addressed to subjects of the state. It is a command laid on those whose obedience is required. The exertion of the will of the state toward an enemy and toward a subject is in the former case a demand for compliance, and in the latter case a command for obedience. A simple command of the state to its subjects, however, is not law. On the other hand, laws are distinguished from simple commands addressed by a state to its subjects in that they receive a peculiar sanction. Every law is accompanied by a provision for physical coercion by the force of the state. It must be clearly recognized that a legal sanction contains no atom of physical force, but only a threat of its use. Force may or may not be applied in fulfillment of the sanction. The law may be obeyed voluntarily, or, if broken, the one offending may or may not be punished. Force is, therefore, no essential element of law. It is on this point that exception has been taken by German scholars to the Austinian theory, for, as they have expressed it, a rule of conduct cannot then be absolutely determined to be a law until it has been enforced. It is true that Austin's school have laid such emphasis upon the idea of force as to make it an essential attribute of law, yet at the same time they inconsistently maintain that supreme lawmaking power is sovereignty, and that sovereignty is will alone and comprises no particle of physical

power. The sanction of law is not force, but simply the threat of force.

While, therefore, force is not an attribute of *law,* the possession or control of force is an essential element of the state. Only a person with the capacity of force is capable of uttering law, for a command for the exercise of force which is non-existent is a mere *flatus voci.* The analytical school has been correct in denying to force, to mere physical power, any place among the characteristics of sovereignty, but it has erred in failing to recognize it as an essential element of the state.

In the foregoing discussion of the nature of law, use has been made of a number of terms of which the signification has been but loosely indicated. These terms are "state," "government," "body politic" or "subjects," and "the force of the state." Since these terms are all of essential consequence to the definition of law, only by the full development of their respective meanings can that definition itself be completed.

All of these legal concepts—of the state as sovereign, of sovereignty as supreme legal will, of government as the organ of sovereignty, of the people as the subject of sovereignty—are mutually dependent.

The nature of the force of the state, it appears from the foregoing discussion, is thus of importance. As to the quality of this force, it is first of all the natural powers of individuals who acquiesce in the will of the state and of other individuals coerced by them into executing that will; and, secondly, of mechanical or other energy capable of producing a corporeal effect, of attaining a substantial end or purpose; and, thirdly, possibly, of voluntary aid from other states,—in short, any physical power actually subservient to the will of the state.

As to the degree or amount of this power, it may be said that the force of the state needs be essentially only such as does actually suffice to secure execution of some part of its will by some portion of its subjects, despite objection from any quarter whatsoever. But it must be remembered

that although an ideal state may be imagined in which obedience to the will of the state is absolute without the possession by the state of any force whatever, yet some force, however slight, must exist, else the will of the state were not sovereign.

The force of the state, then, may be of so slender a proportion under certain imaginable circumstances that it may simply be said to exist. It is at all times a widely fluctuating power. Even at the same point of time the force that the state is able to bring to the enforcement of its will in one direction may vary considerably from that which the state is able to command in another. It may, indeed, in certain cases, be unable to secure compliance with that will; the subjects may resist a specific exercise of sovereignty with such success that the law may have to be repealed or the attempt at its enforcement abandoned. Or, the will of the state may be effectually nullified as to a part of its subjects by open rebellion or by the intervention of foreign powers. So long, however, as it retains its effective force, the state continues to exist.

It is evident, however, that just as the state possesses a physical organ of will, so it must possess an organ of force. Its force must be possessed in a sense differing from that in which the physical powers of its people may be said to be in its possession. The powers inherent in the subjects of the state can be said to belong to the state only in a negative way, i. e., they are the state's only to restrict. The state institutes for its people certain spheres of restraint in action, and thereby creates corresponding spheres of liberty. Actions are, thus, to the people, prohibited or permitted. The same individuals, however, who, as members of the people, are subject merely to restraint, may also have positive actions commanded them by the state. In executing actions so commanded they act not as subjects but as part of the state's organ of force. Hence, just as the faculties of the state have been found to be both volitional and physical, so the government is conceived as the organ both of force and of will. It is by no

means necessary that these organs be identical. On the other hand, the two distinct functions must be clearly discriminated in the government.

The organ of sovereignty, strictly speaking, is solely the supreme formal source of authority for the organ of force, that is, the highest formal source of the commands in accordance with which force is exerted. This organ, however, may delegate its powers or permit administrative discretion, whereby it constitutes the recipient of such delegation its agent in the exercise of sovereignty. Such agents are properly considered a part of the sovereign organ, and when they have an executive function also the two organs are embodied in the same individuals.

It has been stated that a law is a command to the subject of the state. The question then arises as to who are subjects of the state,—as to what is the criterion by which the status of particular individuals as subjects is determined. Obviously, no person is a subject over whom the state does not claim sovereignty, whether in word or act. But is anything further necessary to make an individual subject? It must be answered that the claim by the state alone is sufficient. The state may extend its sovereignty over any rational being it chooses. If it be objected that this makes sovereignty a purely formal matter, it can only be replied that law is itself purely formal. The absolutism of the legal will is formal only and not real. The will of the state is supreme in point of law; but in point of content it is conditioned to such an extent as to be practically determined by innumerable causes, such as public opinion domestic and foreign, the forces at its disposal and those against it.

The idea that sovereignty is in the nature of things limited to the territory of the state, and is there exclusive, is utterly at variance with the analytical conception of sovereignty as supreme legal will. Territory, as irrational matter, is not subject to sovereignty; it does not enter as an element into sovereignty nor into the state as the sovereign.

Territory is therefore incapable of imposing any necessary limitation upon the exercise of sovereignty. Sovereignty is purely and simply personal. It is exercised toward persons only, and may be exercised toward them without regard to their physical location. Geographical boundaries may, indeed, be of the greatest aid in defining those persons over whom the state claims sovereignty, but it thus acts as a limitation only by the choice of the state and not by way of inherent necessity. The limitation of its sovereignty to its own territory may appeal to the state as advisable in order to preserve amicable relations with other nations, but such limitation is not inevitable. Indeed, all the great states of the world today exercise sovereignty outside of their respective territories and acquiesce in the exercise of alien sovereignty within them. Our own country, for example, has laws obligatory upon its subjects living abroad, and, on the other hand, utters no law to the heads or representatives of foreign governments who are within our territory. This latter practice is spoken of as the "fiction of extraterritoriality." There is, however, no need of a fiction to explain a situation perfectly logical according to this theory. Sovereignty is not intrinsically, but only conventionally inseparable from the soil.

It is not at all illogical, moreover, that an individual should at any one time be the subject of more than one state. All aliens within this country, over whom their parent government still claims sovereignty, are at the same time subjects of the United States. So, also, the inhabitants of those South American countries that had won their freedom from Spain in the last century, and had thus become new states, remained during nearly twenty years subjects of Spain before that country relinquished its claim to sovereignty over them. During our Civil War, also, the inhabitants of the Southern States were constantly under two sovereignties. Although every state, by its claim alone, is thus potentially sovereign over all the inhabitants of the earth, yet each, as a matter of policy and practice, finds it

advisable to restrict the exercise of its sovereignty to a community over which, through the general adoption of such abnegation by other states, its sovereignty is ordinarily almost exclusive.

The discussion of the various elements of the state as the source of law thus arrives at the definition of the state as an abstract person embracing an organ possessed of force obedient to an organ of will legally supreme over an aggregate of human beings.

It is true that the assertion of force as an essential element of the state is a formal innovation in the analytical theory, but that it is more than the formal recognition of an element inherent in that theory is denied. The location of that power in an organ of the state is evidently a logical necessity. It is maintained, therefore, that the analytical theory has been here accurately set out.

The analytical school, it will be seen, has failed to analyze exhaustively the activities of the state. From the definition of law that has just been elaborated it is abundantly clear that the point made in the beginning of this chapter was justified, in which the designation of sovereignty was refused to those purposes which a state may manifest toward land, or toward another state, or toward its own subjects without the addition of its sanction. Sovereignty and the will of the state are not identical. On the contrary, sovereignty is but the expression in one direction of a will that is capable of volition in other directions.

A state may, of course, if it chooses, declare all the members of another state its subjects, formulate its will toward them as law, and even treat them as rebels in case of resistance. This is not the practice, however, even in the case of open hostilities. The will of the state remains non-legal in form. If the former course should be adopted, the state would then be no longer dealing with another state. In all interstate transactions, therefore, the will of the state is extralegal, that is, the state does not exercise sovereignty. Since the whole analytical theory rests on the hypothesis

that every act of the state is an act of sovereignty, that theory is logically excluded from the domain of international relations.

This limitation of the sphere of the analytical theory is conclusive without the necessity of pointing out that the exercise of force by the state is also a non-sovereign act, according to that theory, for which it furnishes no explanation.

CHAPTER VI.

Criticism of the International Theory.

In commencing a critical consideration of the international theory one point of contrast between it and the analytical theory immediately presents itself. The analytical theory is properly concerned only with principles that are essential to the very existence of political society. In any possible form or manifestation of public control the conceptions attained by this theory will inevitably be found. Consequently, the analytical concepts must be regarded as of universal validity, that is, as present wherever political phenomena occur.

The international theory, on the contrary, takes cognizance largely of elements that are admitted to be of occasional and accidental occurrence. It was, indeed, at one time asserted that the principles of international law are unalterable even by the Divine Will, but this transcendental conception has been replaced by that of a humanly determined set of customary and conventional rules. Nor are these rules longer considered as necessarily binding on all political communities. Many of the writers on international law appear to deny the title of "political" to all communities not subject to it, but it is now generally recognized that only a limited number of political communities are persons at international law, and that there are other political communities which are not such.

The so-called family of nations may be likened to a club for any common social purpose. Its members must be of a definite order of beings. Just as a social club is composed only of human beings, the family of nations is composed only of political entities. Neither organization, however, includes all the species that belong to the respective orders of its members; certain further, more special characteristics

are necessary in each case. The club may limit its membership by restrictions of sex, age, color, etc., and the family of nations, its personnel by requirements of civilization, size, territory, stability, etc. The membership of each is further limited by the necessity of a desire on the part of one who has all the necessary qualifications to participate in the functions of the society, and by the necessity of a willingness on the part of those already members to receive that one. In short, however much the pressure of circumstances may render its existence expedient, the family of nations is an association, purely voluntary on both sides, of certain political communities, and its membership is arbitrary and in no sense determined upon any immutable principle.

Just as the membership of the family of nations is self-fixed, so are the rules by which the relations of its members with one another are determined, nor is it necessary that these rules should impose the same relations between all members. Consequently, the status of one member may be different from that of another, and the very characters of these conditions are necessarily of an alterable, and not of a rigid or necessary quality.

Since, then, the family of nations is self-chosen and self-regulated, the only principles connected with it that are permanent and unalterable are those that are essential to the nature of its members as political communities. Hence it is impossible to develop other concepts which shall be inherent in the very existence of international intercourse. No conception of the attributes of the parties to that intercourse other than of those involved in the nature of the political community itself, no conception of the character of the relations existing between those parties, no conception of various categories or of variety of status into which they may be cast, can have other than a relative validity. International law is an actual, but not a necessary, fact, and it comprises real, but not inherent, principles.

It follows that a theory of international law that seeks to explain relations that exist between certain political communities must comprehend concepts over and above those

vital to such bodies. It has, in erecting a complete idea of the subjects, or persons, of international law, to deal with (1) elements that are universal and immutable, and (2) elements that are accidental and contingent. The former of these, the elements fundamental to the political community, are inalterable in any manner. No change of time or place can affect them. No action or convention by the entire family of nations can make that a nation which has them not. The second class of elements, on the other hand, are always liable to amendment through the actions of the parties to international law.

It is necessary, therefore, in considering the international theory, to separate those elements that are perpetual from those that are merely temporary. Those elements that are permanent have been said to constitute the essential conception of the political community. When to these are added certain other arbitrary elements there is created the subject or person of international law. This latter conception will be here spoken of only as the "nation," a term employed by international writers as a synonym for the "state." The political community, then, may be said to be the order, and the nation the species. The objection to the latter term on account of its ethnological significance is evident, yet the use of it in this sense is believed also justifiable, especially in view of the common acceptation of the terms "family of nations," and of "international law" or "law of nations." Independence and sovereignty are likewise used as alternative terms by writers on international law. Independence alone, however, will be used here in order to avoid as far as possible the adoption of the terms already employed to denote concepts of the analytical theory.

This use of terms accepted, it is now necessary to learn which of the elements of the central concept of the international theory are essentially involved in the nature of the political community and which are superadded to erect the more specific concept of the nation. These elements, original and superadded, are government, independence, territory, and people.

A government, in the international theory, is the holder of the rights and powers of the nation.

Independence (including all that is generally termed sovereignty in the international theory) is composed of a number of rights and powers. The alternation among international writers between the use of the words "rights" and "powers" is apparently deemed perfectly consistent, and yet it is the source of some uncertainty. If the use of the terms is consistent, then the word "powers" is clearly excluded from the realm of the physical and concrete. The international theory asserts the possibility of dividing these rights or powers in such a way that either (1) their exercise may be suspended or (2) their exercise may be transferred. If by "powers" is meant bodily or material strength, force and energy—in short, the *might* of the nation—then those powers are incapable of division in such a way that their innate capacity for exertion toward certain ends can be destroyed without the annihilation of the powers themselves. A subjective faculty is not thus limitable. If, for example, by the "power to make treaties" is meant the possession of the physical faculties essential for the accomplishment of one party's share in that act, then it is impossible that that power shall be destroyed in reference to some nations without being destroyed in reference to all. In this sense a nation could not possess the power of treating only with one other nation. Thus the Transvaal, before the late war with Great Britain, could not have exercised its power of treating with the Orange Free State if the deprivation of that power toward other nations had signified an actual loss of the inherent capacity for treating. Nor will the distinction drawn by some writers between the possession and the exercise of the powers of independence render admissible the conception of these powers as physical. The exercise and the possession of such powers cannot be so differentiated that their exercise can be transferred to another nation without the transfer of their possession as well, and since the latter cannot be partially effected, it follows that no more can the exer-

cise of these powers be divided. It is thus clear that in the international theory the term "powers" is consistently used only in the abstract sense of "rights." The two terms are fully convertible.

The enjoyment of certain definite rights, then, by the nation has been erected into a standard that is called "independence." Any nation that enjoys all these rights is termed independent. This is the whole meaning of the term "independence" as used in the international theory. It refers to no absolute freedom of any kind whatsoever. It is not perfect liberty to do either what the nation wills or what the nation can do. Each member of the family of nations owes its rights to the others, for those rights are the results of contracts express or implied to which the others are parties. In the ordinary, absolute sense of the word there is no political community that is truly independent. Certainly all within the range of international law are dependent in this sense. The very possession of a fixed territory, in so much at least as it is something more than bare physical possession, is dependent upon the assent of other nations to the recognition of its boundaries. To that comparative condition in which nations are least dependent, however, in which they are by international law most free to exert physical powers, is technically attached the term "independence."

Since independence, then, denotes not a complete absence of dependence, but only a certain least degree of dependence, it is entirely logical to recognize degrees of independence or rather of dependence. There may be dependent as well as independent nations; that is, there may be nations that enjoy but a part of the rights of independence ("semi-sovereign states," so-called). Since independence is a mere bundle of rights, its reduction is perfectly conceivable. The deprivation of the right to do a certain thing takes from the nation neither the possession nor the exercise of will or power to do that thing. The diminution of the rights of independence is logically possible, since it implies no impairment of an indestructible unity.

The contention of the international writers that their concept of dependence ("semi-sovereignty") is philosophical, is therefore clearly justified. Since, however, independence is conceived to consist only of rights, and since these rights are those which are contracted within or recognized by the family of nations, it follows that other political communities may not, and actually do not, enjoy these rights in the same way. Political communities, not members of the family of nations, may indeed have rights and duties imposed upon them by international law, but they are of themselves incapable of contracting such rights and duties. The right of contracting with other nations is essential to international personality and to the acquisition of the rights of independence. Hence independence is to be regarded as an attribute of the international unit alone and not of all political communities.

Although independence consists only of rights, it is to be observed that these rights of independence either lie to the exercise or to the exemption from exercise of the power or will of the nation in accordance with specific limitations, or else lie to the exercise or the restraint from exercise of the power or will of other nations likewise agreeable to specific regulations. Both the rights and the duties of a nation necessitate the possession of physical force and will. Hence, although the rights and powers of independence are not themselves concrete, physical powers, yet the predication of such physical powers in their subjects is unavoidable. The international theory, therefore, like the analytical theory, fails to give formal recognition to the idea of force. The international theory fails entirely, also, to place emphasis on the idea of will as a constituent of its concept. Rights alone, and neither power nor will, are actually represented by a distinct concept in the international theory. Of the natures of the will and force of the nation the international theory offers no explanation.

The nation is thus conceived in the international theory as the possessor of certain rights constituting independence. This independence, however, is territorial; its possession is

connected with the possession of a fixed territory. The element of a fixed and permanent territory is essential to the idea of the nation, yet it may be clearly inferred that modern supporters of the international theory agree that a territory is not necessary.

Indeed, unless political character is to be denied to practically all those small and inferior communities that take little or no part in the international life of the world, territory is indisputably no essential of that character, for few of these communities have permanent and definitely fixed possessions in lands, though perhaps some such example may be cited, as, for instance, Afghanistan. Whatever may be the comparative lack of importance of all nomadic communities, their relatively low civilization, and the absence among them of many social and individual characteristics found among the peoples of the family of nations, such communities ancient and modern, which exhibit the phenomenon of public authority, cannot be philosophically denied a political nature. The little known tribes of the centres of Africa and Asia may play an insignificant role in the political life of the world, but they are none the less political entities. They are not included in the sphere of international law, and hence are not nations, but it is entirely conceivable that there might be a society of nomadic communities regulated by a system much like modern international law. International law arbitrarily conditions its enjoyment upon the possession of a territory, but that condition is not an inherent necessity. It must be concluded, therefore, that territory is another occasional element that is found in the nation without being found in all political communities.

Although unity of various kinds has been ascribed in the international theory to the people of the nation, the only unity generally recognized in the people is that of a common habitation within a certain domain which itself possesses a kind of unity through incorporation into the territory of a single nation. It is to be observed, however, that this can only be a short explanation for a situation that

involves a further analysis. The jurisdiction of the nation extends over its territory. If, then, all persons upon that territory are members of the people, it is because the fact of membership relates back through the territory of the nation to the exercise of the jurisdiction of the nation. The extent of the territory of the nation is the measure of its jurisdiction, but is not the ultimate criterion of the people.

A fiction may afford a practical rule of conduct, but it cannot constitute a philosophical explanation of a given phenomenon. If, then, the international theory seeks to present, not the arbitrary principles asserted by international law, but their philosophical basis, it must look beneath the subterfuge by which extraterritorial jurisdiction is reconciled with the principle that jurisdiction is coextensive with territory. As a practical expedient of international law, no argument is made here against the fiction of extraterritoriality. It is only as involved in a philosophical conception that it is objected to. Its application leads to such anomalous situations as that of the Oregon country during its joint occupation by the United States and Great Britain. "It has been held that, during the period of joint occupation, the country, as to British subjects therein, was British soil, and subject to the jurisdiction of the King of Great Britain; that, as to citizens of the United States, it was American soil, and subject to the jurisdiction of the United States" (*McKay v. Campbell,* 2 Sawyer, 118).[1] Such a situation is obviously based on a fiction, and since philosophy deals with truth and not with fiction, it must recognize that a nation has a right of jurisdiction over persons and not over territory, however useful and well-nigh perfect a guide its territory may be in the determination of what persons are subject to its jurisdiction.

The people, therefore, according to the international concept, is that body of individuals who are subject to the nation's right of jurisdiction. This right attaches only to

[1] Moore's Digest of International Law, Vol. III, p. 277.

the exercise of force whose superiority over certain individuals as against any force actually opposed to it is regarded by the family of nations as established. Thus no rigid standard is erected. Minor interruptions to the absolute superiority of the force of the nation over its people, even when of long continuance, as in the case of successful brigandage, are disregarded. Even open revolt has to assume certain proportions before it receives recognition. What extent or what duration of opposition to the force of the nation interrupts its jurisdiction in regard to certain individuals is dependent upon the discretion of all the nations. When such a stage is reached the right of jurisdiction *pro tanto* is transferred to the opponent by the simple process of recognizing in him a corresponding right to territory.

An element in every concept of the international theory is thus seen to be a right or rights. The nation is the possessor of rights; independence consists of rights; territory comprises a right; the people are subjects by right; and the government exercises rights. When, therefore, the idea of rights is abstracted from the concepts of the international theory, they dissolve. These rights have been seen, however, not to be essential to the political community. Hence, with the idea of rights included, these concepts cannot make up the fundamental concept of the political community. The validity of the international theory is necessarily limited, therefore, to the sphere of international law.

Breaking down now the concepts of the international theory into their elements, and eliminating those that have been shown to belong only to the nation, there remain as necessarily inherent in the idea of the political community the ideas of a ruling organization, of a will and of a force in it, and of a number of persons over whom this will and force are exercised. These ideas of the essential nature of the political community are fully in consonance with those that are accepted in the analytical theory for its concept of the state. Hence it may be concluded that the two theories are perfectly compatible.

It has been shown that a state is not also necessarily a nation. The question arises, then, whether the nation is necessarily a state. It may be asked, in the first place, if, the attributes of the nation having been shown not to be necessary to the state, they may attach to other than political entities. This query hardly requires a formal answer, for all the concepts of the international theory are concerned with groups of men organized for the exercise of public authority, and so conform to the definition of the political nature.

An inquiry of far greater significance is whether the nation is solely that supreme political body which is the state, or whether the nation need include only a subordinate political unit. To put the matter in another form, does the nation necessarily include within itself a sovereign will?

In answering this question it must be noted that many of the rights and duties of independence are susceptible of application to the conduct of subordinate political bodies or even of non-political bodies and individuals. Such rights and duties are, however, as to non-political units, simply *imposed,* and hence are not essentially of like character with the rights and duties of nations, which, it has been seen, are *contracted.* Now it is not an uncommon practice for a subordinate, that is, non-sovereign, political unit, to have treaty-making rights; it may thus possess rights and duties through a contract to which it is a party. It has just been shown, however, that a subordinate government acting in an unofficial, i. e., non-political character, cannot acquire the rights and duties of a nation; but in its official, or political, character, it exists solely as an agent of a sovereign organ. All the political acts of a subordinate government, therefore, are those of an agent, and the principal to the contract is a state. Hence it must be concluded that the nation, or subject of international law, is always a state, as that concept is defined in the analytical theory.

CHAPTER VII.

Conclusions.

The preceding discussion of the two great political theories, in which is found asserted, in the one the indivisibility of sovereignty, in the other its divisibility, leads to the conclusion that the two theories are entirely congruous, in spite of their use of the same terms with different signification.

The applicability of the principles of each theory is confined to a distinct sphere. The analytical theory determines the nature of the internal organization of the state, of its municipal, including its constitutional, law; the international theory explains the nature of the mutual relations of states, the nature of international law. The analytical theory with its "sovereignty" and kindred concepts affords no explanation of international law, nor the international theory with its "independence" any explanation of constitutional law.

It is, of course, a fact that principles of international law have by statute been adopted into municipal law, and are thus in very large part to be found in the municipal law of most of the various nations; that is, applied in their municipal courts. The fact that the same principle is recognized by the nation both by way of international law and of constitutional law does not merge the two distinct natures of that principle in its separate capacities. The nation may enact into law a rule of conduct taken from any source it may choose, but it cannot thereby alter its own essential nature. To illustrate, international law recognizes a specific territory as belonging to a nation; that nation may or may not, as it sees fit, erect that international possession into constitutional possession, for the possession of land is inconsequential in the analytical theory. On the other hand, international law

recognizes certain individuals as subjects of the nation, but, even if the definition by international law of "subject" be adopted into the municipal law, that adoption is incapable of operating to change the nature of the "subject" of municipal law, for that is immutably fixed.

Thus it is plainly necessary to keep distinct the concepts of each theory, and there are a number of minor concepts the significance of which for the one theory or the other, for international or constitutional law, or for both, it is essential to determine.

The subjects of a state have been defined as those over whom sovereignty is exercised; the subjects of the nation, as those over whom lies a right of jurisdiction. Since states do not in practice attempt to enforce their sovereignty where their right of jurisdiction does not extend, this divergence is not a pregnant source of confusion. There are actually, however, both in constitutional law and in international law, certain recognized classes of subjects. The principle of division is allegiance. Allegiance is a duty imposed by the state upon a subject to support it loyally against all its enemies. In constitutional law allegiance divides the subjects of the state into citizens and alien subjects, and in international law, into nationals and alien subjects.

Each state fixes entirely for itself the special rights and duties of its citizens, as also the manner of acquisition of its citizenship. In general, all persons born within the territory of the state are held to its allegiance, although there are exceptions to this rule which at times cause the condition of "double allegiance." The greatest reason of the latter situation, however, is naturalization, which is the imposition of allegiance upon aliens born. As a correlative to the exercise of its power of naturalization the state usually recognizes the doctrine of expatriation, by which its own citizens are permitted under certain conditions to absolve themselves from its allegiance. In cases then where the circumstances of naturalization are those under which the state of prior allegiance recognizes the

right of expatriation, there is no question of the status of the individual; where, on the other hand, the circumstances are not such as permit expatriation, the effect of naturalization is to make the individual a citizen of two states. There is in this double citizenship no anomaly for municipal law; the law of each state is sufficient unto itself.

In international law, on the contrary, when the practice of naturalization by one state is not in conformity with the right of expatriation acknowledged by another, there is recognized the allegiance only to the one or to the other. Hence, the citizens of a state are not always recognized as such in international law. It is convenient, therefore, to style nationals those individuals to whose allegiance the right of the nation is admitted by international law.

Within the territory of the independent nation its rights over its own nationals are almost unlimited. Over alien subjects, on the contrary, while it alone usually exercises jurisidiction, there are certain rights over them that must be observed in the nation to which their allegiance is due. These rights are to require their proper protection and to make laws of a certain class for them. In the case of so-called double nationality, national character is really lacking in the individual, and the rights and duties to which he is held are but similar to those of allegiance.

Finally, it is necessary to treat of the classification of nations. The fact has already been developed that independence is simply a collection of rights generally possessed by nations. It has not a fixed and permanent content, but varies with many factors, and chiefly with the intensity of the common desire for international order. Every general limitation upon the exercise of the powers of the nations has the necessarily coincident effect of erecting a sphere within which their powers may be exercised without interference. The establishment of order is at the same time the creation of liberty. It may be asserted, then, that independence is increasing at the present time among nations.

No two of the nations, however, possess the rights of independence in precisely like degree. The only equality

among nations is that they all possess an equal subjectivity or personality at international law; all are entities capable of contracting or repudiating their rights and obligations. Thus, even at a given time, independence must be considered as a variable quantity. The greatest of nations may, for example, possess its territory subject to certain servitudes which lesser nations escape, as for instance, innocent navigation of a territorial channel.

There is, therefore, no absolute line that can be drawn between independence and dependence; nor, for similar reasons, between degrees of dependence. The best that can be done by way of classification of the nations is the recognition of certain modes of employment of the rights of independence, or of the deprivation of certain prominent rights, which mark a noticeably peculiar status at international law.

The best line of demarcation of classes among nations is that of the responsibility of a common agent in the exercise of rights over the entire territory of the nation. Where a nation exercises rights, if at all, through its own exclusive agents, or through an agent who, though common to another nation, is yet responsible to itself for the exercise of its rights, or where the rights exercised by its common agents extend to only a portion of its territory, the nation is commonly called independent; where, on the contrary, a common agent exercises one or more of the rights of a nation as to its whole territory, without responsibility to it, the nation is said to be dependent. Among independent nations, it is seen, there may be distinguished three groups: (1) those that exercise all the rights of independence that they possess through their own agents; (2) those that have rights exercised by agents responsible to themselves in common with other nations; and (3) those that have rights exercised as to a portion of their territory by agents who, within the limits of their office, are not directly responsible to themselves.

The bare relinquishment or deprivation of certain of the rights of independence is not regarded as a material im-

pairment of that attribute. Two categories of independent nations in this situation are recognized. One of these consists of neutralized states, which do not possess the right of offensive warfare; and the other comprises tributary states, which are under an obligation to pay a tax to another nation. With this group may also be placed nations which enjoy rights not generally possessed by independent nations and hence not necessary to the conception of independence. These are guaranteed states.

The employment of a common agent, responsible to each of the several nations, constitutes an alliance or union. Such is the personal union in which two or more nations have a common ruler through accident or coincidence. The real union or confederation is a form in which the employment of a common agent is the result of treaty. In both the personal union and the real union or confederation the rights exercised by the common agent include always a part at least of the rights of treating with other nations. Many unions of states through which are established commissions of one kind or another are not classified in international law, owing to their temporary character or to the relative unimportance of the rights exercised by the agent.

The third class of independent nations consists of those, one or more of whose rights are exercised as to a portion of their territory by an agent not responsible to themselves. Such are the nations subject to the exercise within definite areas of their territories of foreign consular jurisdiction over aliens of the consuls' nationality. Such also are the nations portions of whose territories are administered by a common agent not responsible to themselves. Territory thus held is known partly as leased territory and partly as vassal territory. The nation that possesses the right of territory is the suzerain state; the nation to which the common agent is responsible is the lessee or administering state.

A dependent nation is one that has an agent not directly responsible to itself in common with some other nation for the exercise of one or more of its rights of independence as to its entire territory. Of this class is the protected

state, which differs from the guaranteed state in that in return for protection it relinquishes some portion of its independence to the exercise of a common agent. An administered state is unlike the protected state in that the rights exercised by the common agent in the former include those concerned purely with internal administration.

These classifications are all those provided by international law for the status of its subjects. They are all based on relations to territory. There are, however, lands which are not incorporated in the territory of any nation, and yet over which are recognized other rights, less than that of territory. The lowest form of an interest in lands is known as a sphere of influence. It is the result of an agreement by which the signatory nations agree that one of them shall have the exclusive right of acquiring possession of certain unappropriated lands. This sort of an interest is hardly international in character. When, however, certain rights in such lands have actually been claimed and recognized by the family of nations, without, however, a claim of territory, these lands are erected into a protectorate.

There are two other concepts of international law that require definition. A belligerent community, though granted certain rights for the purposes of war, is not a subject of international law, but possesses those rights solely by conferment and not by contract. The effect at international law of the recognition of a belligerent community is to erect it into a government *de facto*. A government *de facto sed non de jure* is one in which are recognized certain temporary rights of government in derogation of the rights of another state, which are thereby temporarily suspended. Military occupation constitutes the lands occupied a part of the territory of the occupying nation until their final possession is determined.

Although the federal state is usually treated as a concept of international law, it is really one of constitutional law, and signifies a form of government in which subordinate political communities have a peculiar autonomy but in which the supreme decision of competency rests in a central organ.